VOLUME 2

REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA

THE DEATHS OF HELEN BETTY OSBORNE AND JOHN JOSEPH HARPER

COMMISSIONERS
ASSOCIATE CHIEF JUSTICE
A. C. HAMILTON
ASSOCIATE CHIEF JUDGE
C. M. SINCLAIR

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PUBLIC INQUIRY INTO THE ADMINISTRATION OF JUSTICE AND ABORIGINAL PEOPLE

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The circle, symbolic of the drum, which is important to Aboriginal peoples, dominates the logo. Part of the symbolism of the drum is to represent the heartbeat of Mother Earth and closeness to nature. The circle is also symbolic of harmony and balance.

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August 12, 1991

The Honourable James C. McCrae
Minister of Justice
Room 104 Legislative Building
Winnipeg, Manitoba
R3C 0V8

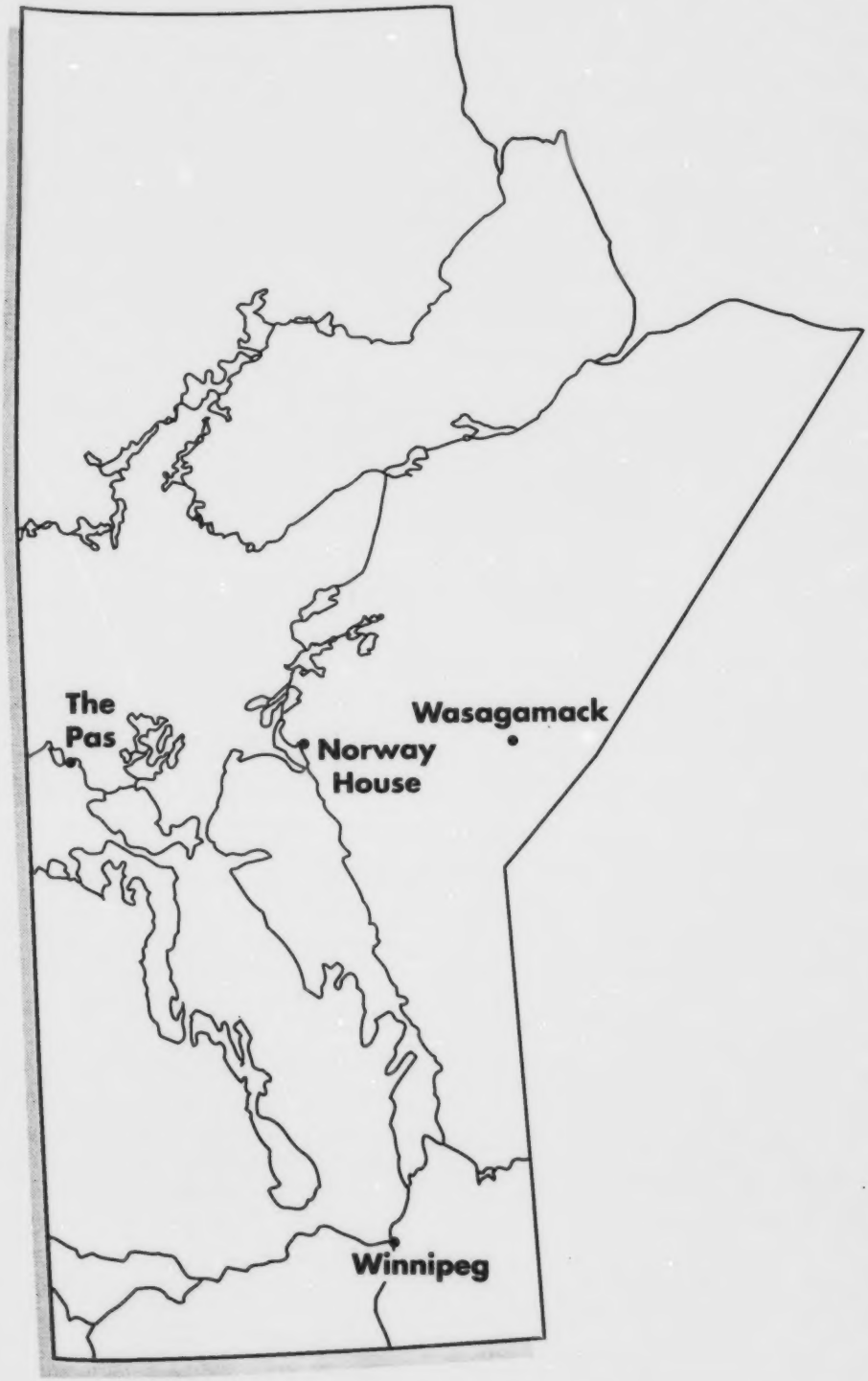
Dear Mr. Minister:

We, the Commissioners appointed to investigate, report and make recommendations respecting the relationship between the administration of justice and Aboriginal peoples of Manitoba, and to investigate all aspects of the deaths of Helen Betty Osborne and J. J. Harper, hereby submit our Report.

Yours respectfully,

Associate Chief Justice A. C. Hamilton,
Commissioner

Associate Chief Judge C. M. Sinclair,
Commissioner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THE DEATH OF HELEN BETTY OSBORNE

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CHAPTER 1

INTRODUCTION

The Events

Helen Betty Osborne was abducted and brutally murdered near The Pas, Manitoba, early in the morning of November 13, 1971. The high school student, originally from the Norway House Indian Reserve, was 19 years old when she was killed.

Several months later Royal Canadian Mounted Police officers concluded that four young men, Dwayne Archie Johnston, James Robert Paul Houghton, Lee Scott Colgan and Norman Bernard Manger, were involved in the death. Yet it was not until December 1987, more than 16 years later, that one of them, Dwayne Johnston, was convicted and sentenced to life imprisonment for the murder of Betty Osborne. James Houghton was acquitted. Lee Colgan, having received immunity from prosecution in return for testifying against Houghton and Johnston, went free. Norman Manger was never charged.

These are the facts, as suggested by the evidence:

While walking along Third Street in The Pas on that cold Saturday morning, Betty Osborne was accosted by four men in a car. Houghton, who was driving, stopped the car and Johnston got out, attempting to convince Osborne to go with them to "party." She told them that she did not wish to accompany them. She then was forced into their car and driven away. In the car Osborne was assaulted by Colgan and Johnston as Houghton drove. Johnston ripped at her blouse and Colgan grabbed at her breasts. In spite of her screams and attempts to escape, Osborne was taken to a cabin belonging to Houghton's parents at Clearwater Lake.

At the cabin she was pulled from the car and beaten by Johnston while the others stood watching and drinking wine they had stolen earlier. Osborne continued to struggle and scream and, because her assailants were afraid they might be heard, she was forced back into the car and driven further from town to a pump house next to the lake. At least some of her clothing was removed by her assailants in the car. At the pump house she was once more taken from the car by one or more of her assailants and the beating continued. Her clothes, those which had not been removed earlier, were taken from her. Wearing only her winter boots, she was viciously beaten, and stabbed, apparently with a screwdriver, more than 50 times. Her face was smashed beyond recognition. The evidence suggests that two people then dragged her body into the bush. Her clothes were hidden. The four men then left, returned to The Pas and went their separate ways.

Her body was discovered the next morning and the RCMP commenced its investigation. Initial police efforts centred on the possibility that Osborne's murderer was one of her friends or was known to them. RCMP officers rounded up her friends and questioned them. They were all Aboriginal. Police had no success in identifying the assailants until they received an anonymous letter in May 1972, implicating Colgan, Houghton and Manger.

The letter was written by Catherine Dick who, it was later discovered, had been told of the murder by Lee Colgan shortly after it took place. Police then seized the Colgan family car, which had been used in the abduction. Examination of the vehicle revealed traces of hair and blood as well as a piece of a brassiere strap.

Shortly after the seizure of the car, an informant told police the fourth man in the car that night was Dwayne Johnston. Attempts to question the suspects were frustrated when the men, on the advice of their lawyer, D'Arcy Bancroft, refused to speak with the police. Repeated attempts and a number of ruses were unsuccessful in breaking through their silence. The police found it impossible to gather sufficient evidence to support a charge of murder against any of the four men believed to have been involved in the murder. By the end of 1972, although rumours were circulating in The Pas as to the identity of those involved in the killing, the investigation had stalled.

Between 1973 and 1983 only intermittent checks were made on the case. In July 1983 an extensive review of the file was begun by Const. Robert Urbanoski, of the Thompson RCMP detachment. Many of the original informants were reinterviewed. The suspects were contacted again. In June 1985 the RCMP placed an article in the local newspaper, requesting the assistance of the public in solving the murder. The result was that several people came forward to recount comments about the murder made over the years by Colgan and Johnston. It was the disclosure of those remarks that finally led to charges of murder being laid against the two in October 1986.

Before the beginning of their preliminary hearing in March 1987, Lee Colgan was granted immunity from prosecution in return for his testimony. On the strength of Colgan's evidence, Houghton was arrested and charged on July 5, 1987. At the preliminary hearing later that month, both Houghton and Johnston were committed to stand trial. The Attorney General's department brought the case to trial in December 1987. Sixteen years after the murder, a jury found Johnston guilty of the murder of Betty Osborne. He was sentenced to life imprisonment without eligibility for parole for 10 years. Houghton was acquitted.

Johnston's appeal of his conviction was dismissed by the Manitoba Court of Appeal on September 14, 1988 and his application for leave to appeal to the Supreme Court of Canada was denied on March 13, 1989. He is now serving his sentence.

Many Manitobans asked why it took 16 years to bring people to trial for this brutal murder. It was suggested that many people in the town of The Pas learned the identity of those responsible, some within a very short time after the murder, but chose to do nothing about it. It was suggested that because Osborne was an Aboriginal person, the townspeople considered the murder unimportant. Allegations of racism, neglect and indifference, on the part of the citizens of the town, the police and of the Attorney General's department, were made.

The trial and its outcome focussed public attention on the Osborne case and led to widespread calls for a public inquiry. On March 9, 1988, three months after the trial of Houghton and Johnston, J.J. Harper, executive director of the Island Lake Tribal Council, was killed in an encounter with a City of Winnipeg police officer. This precipitated increased demands by Aboriginal and non-Aboriginal Manitobans for an inquiry into all aspects of the way Aboriginal people are dealt with by the justice system in Manitoba. On April 13, 1988, by Order-in-Council, the provincial government established the Public Inquiry into the Administration of Justice and Aboriginal People. The order was confirmed subsequently by an act of the Legislature, entitled *An Act to Establish and Validate the Public Inquiry into the Administration of Justice and Aboriginal People.*

The Mandate of the Inquiry

The Act which established the Aboriginal Justice Inquiry specifically requires us to look into the circumstances surrounding the investigation into the murder of Helen Betty Osborne. Section 7(b) of the Act provides that the Inquiry and the Commissioners:

> [I]s and are declared to have the right to investigate into the death of Helen Betty Osborne and all aspects of the laying and prosecution of charges which followed, including whether the right persons were charged, whether the appropriate charges were laid, whether charges should have been laid earlier, whether immunity from prosecution should have been granted to Lee Colgan, whether there exists any evidence of racial prejudice with respect to the investigation of the death of Helen Betty Osborne, whether the acts or omissions of any persons outside the Police Department impaired the investigation and whether the prosecution was properly conducted.

We granted standing to: Justine Osborne, the mother of Betty Osborne; the Norway House Indian Band; the Indigenous Women's Collective; and the Royal Canadian Mounted Police. The Swampy Cree Tribal Council also was granted standing on the condition that it, Justine Osborne and the Norway House Band would be treated as one party. Counsel acting for the parties were: John Wilson, for Justine Osborne and the Norway House Band; Monique Danaher, for the IWC; and Hymie Weinstein Q.C. and Craig Henderson, for the RCMP. Commission counsel were Perry Schulman Q.C. and Randy McNicol Q.C.

Limited standing was granted to the Manitoba Metis Federation to make a submission at the close of the proceedings. We rejected the application for standing made by Dwayne Archie Johnston, the only person convicted of the murder of Betty Osborne, because we believed he did not have a direct or substantial interest in the matters we were to examine.

Our counsel, in concert with the investigator they engaged, determined what witnesses we should hear. Some witnesses were suggested by other counsel and were then called by our counsel. We made a specific request to hear from all those who might be able to shed light on what happened on the night of Osborne's abduction and murder. Commission counsel also called a number of expert witnesses to assist us in evaluating the conduct of the many persons involved in the investigation and prosecution of Osborne's murder.

We heard the majority of the testimony in The Pas between June 19 and August 10, 1989. In addition, we heard two days of testimony in Winnipeg, August 31 and September 18. Through the testimony we were able to examine the murder, the investigation, the attitudes prevailing in the community, the situation of Aboriginal students in The Pas, and the relationship between the police and the Aboriginal community. We also examined the conduct of two lawyers, John Scurfield Q.C., who was Houghton's trial lawyer, and the late D'Arcy Bancroft, who represented the four men in the early days of the police investigation. In addition, we examined the conduct of the Attorney General's department.

We heard from many more witnesses than those who testified at the trial of Houghton and Johnston. All four men who were involved in the events leading up to Betty Osborne's abduction and murder were called to testify.

As a Commission of Inquiry we are entitled to assess the evidence using the civil standard of proof, whereas in a criminal case all facts must be proved beyond a reasonable doubt. For these reasons we are entitled to make findings of fact and to reach conclusions that might differ from those supported by the evidence at the murder trials. We wish to make clear, however, that we are not attempting to circumvent the jury's decisions or to determine whether their decisions to convict Johnston and acquit Houghton were proper decisions. On the contrary, we wish at the outset to state that we do not quarrel in any way with the jury's findings. Their decisions are not part of our mandate, and we accept that they were entitled to make the decisions they did and that they did so properly.

As a judicial inquiry we were asked, and we endeavoured, to determine facts and events not only from the evidence as presented at the preliminary hearing in July and the trial but also from additional evidence which we heard—evidence which criminal proceedings are precluded from hearing.

Chapter 2

The Pas, 1971

Betty Osborne

Helen Betty Osborne was the eldest of the 12 children born to Justine and Joe Osborne at Norway House, a remote Cree community at the northern end of Lake Winnipeg. When she was growing up, Norway House had limited educational opportunities. The local Roman Catholic school did not teach beyond grade eight.

Because Betty Osborne wanted to become a teacher, she had to continue her education elsewhere. So in 1969, at the age of 17, she left her community and went to a residential school for Aboriginal youth. This institution, the Guy Hill Residential School, was situated at Clearwater Lake, 29 kilometres from the town of The Pas. Guy Hill was run by the Roman Catholic Church and, although all its students were Aboriginal, none of its teachers was. It was one of the objectives of this school to assimilate Aboriginal students into white society. We were told, for example, that students were punished for speaking their Aboriginal languages in the school. In this difficult environment new bonds of friendship were formed among the students, who had one thing in common: they were all away from their home communities.

After two years of living at Guy Hill, Osborne moved into The Pas to attend high school at Margaret Barbour Collegiate. In September 1971 the Department of Indian Affairs arranged room and board for her with William and Patricia Benson in their home on Lathlin Avenue. Benson, a Metis, worked at the Churchill Forest Industries

complex as a production foreman and was responsible for training sawmill employees. The couple apparently showed real concern about Osborne's welfare.

Betty Osborne was a shy young woman, who had several very close friends, including a boyfriend, Cornelius Bighetty. We got the impression she was quiet and serious. One of her friends, Eva Simpson, told us she was "a very kind person" and "a good friend." She was also lonely for home. Simpson said:

> (S)he was hard working in school and she liked to have a good laugh I guess, and we tried to cover up our feelings because we were lonesome to go home and yet we knew we had no way to survive if we were in Norway House so we kind of hung around together....
>
> (W)e were very lonesome. (p. 2927)

Like other students from Guy Hill, Osborne did not appear to have had any close white friends, but may have gained some white acquaintances through activities at school. Her relationship with the white community of The Pas was distant and typical of that of most Aboriginal people, even those who had spent all their lives there.

The Pas

Long before the coming of Europeans, the area around The Pas was a gathering place for Aboriginal people. There has been continuous habitation in the area for at least 5,000 years. Its name reflects its Aboriginal history as well as its geography. The origin of The Pas is thought to be from the Cree word *W'passkwayaw*, which translates as "like a wooded narrows."

Being at the confluence of the Saskatchewan, Pasquia and Carrot rivers made The Pas a natural centre for trade. The first European to visit the area was Henry Kelsey, an employee of the Hudson's Bay Company who camped there in 1690. In 1749, La Verendrye and his sons visited the area and built a fort which they named Fort Paskoyac. The Pas became a major trading post, and remained so throughout the heyday of the fur trade.

The Indian bands around The Pas signed an adhesion to Treaty 5 in 1876. In 1882 their reserve was surveyed and set aside. The Pas Band claims to this day that it has not received its full entitlement of reserve land owed by the government under the treaty. In 1906, when the railway was being extended to The Pas, the band surrendered 500 acres which now make up a major part of the town site. The land was to be divided into lots for sale to those who would settle in the area. Controversy still surrounds the sale of those lots. Not all have been sold. The band maintains that the department improperly handled the sales and the proceeds.

Today The Pas Indian Reserve consists of 17 parcels of land in and around the town site. The band has nearly 2,000 members, most of whom live on the reserve close to town. Other parts of the reserve land are completely isolated. The abundance of fish and game in the area surrounding the reserve allows some band members to continue to pursue their traditional activities of hunting, fishing and trapping. The band also owns a shopping mall and a trailer park.

THE PAS, 1971

The population of the town of The Pas is now slightly more than 6,000. It is a thriving industrial and tourist centre. There is a substantial mixed-farming economy in the area, the first grain having been sowed in 1754. Logging began in 1910 and in the early 1970s, a major government-sponsored pulp and sawmill complex, now owned by Repap Inc., was built. The railway arrived at the community in 1908 and the line to Churchill was completed in 1928. In the 1950s a line was built to the mines at Lynn Lake.

The Saskatchewan River separates the town of The Pas from the main part of The Pas Indian Reserve. But the division of the community was more than geographical in 1971. The Pas was divided into two parts: one white, and one Aboriginal. Few Aboriginal persons were employed in town. It remained largely non-Aboriginal. It is easy to conclude that the town of The Pas deliberately had excluded Aboriginal people from its midst, yet it depended on them as customers and consumers. While there was some superficial communication, the communities might as well have been worlds apart. Neither community encroached far into the life of the other or felt welcome in it. There appear to have been few who visited in the homes of the other community. Apparently, part of this estrangement was due to the general difference in economic status. It was also due to the fact that the lifestyles and interests of each were basically different. Members of each community were clearly identifiable to the other and skin colour immediately seemed to raise stereotypical feelings of fear, suspicion and dislike. These attitudes existed in both communities in 1971 and to a large extent still exist today.

The testimony we heard suggests that this town to which Betty Osborne moved to pursue her education was a troubled one. At the movie theatre, each group sat on its own side; in at least one of the bars, Indians were not allowed to sit in certain areas; and in the school lunch-room, the two groups, Aboriginal and non-Aboriginal, ate apart.

Even in the homes where Aboriginal students boarded there was separation. Annaliese Dumas, a friend of Osborne's who testified at the Inquiry, told us of her experiences. The students had no input into where they would stay. Although the intent in placing these children in community homes was to give them a home environment, we believe that Dumas and others were treated like boarders and not like family members. Dumas usually was restricted to the use of the kitchen and her bedroom. "It was a rule for us, I guess, not to be anywhere other than our bedroom and the kitchen," she said. She was not allowed to watch television and, when the people with whom she boarded had children, she always was treated differently from those children.

If one defines racism as behaviour which is determined by considerations based upon race, then this separateness should be considered an expression of racism. Sometimes this racism is not overt but is, rather, ingrained in the subconscious or in the patterns of behaviour of the community, beyond the awareness of those who practise it.

It appears the men who policed The Pas in those days were subject to this form of unconscious racism. During the earlier part of our hearings in The Pas, the majority of the witnesses who were or had been members of the RCMP in 1971 denied any knowledge of racial tension or problems between the Aboriginal and non-Aboriginal communities. It was former Sgt. Larry Grosenick, the officer in charge of the investigation from the time of the murder until he left The Pas in August 1973, who gave us the first

glimpse of another picture of life in The Pas. He told us that while interracial violence wasn't common, when it did occur it was usually a case of an assault by a white man on an Aboriginal man. This suggests that race was a factor in the violence that appears to have been so much a part of The Pas.

Grosenick also made it clear that while relations between members of the two communities generally were civil, this civility was only superficial. People might chat or exchange pleasantries, but when it came to a closer social interaction it was apparent that the two communities were far apart.

Furthermore, racial harmony in The Pas in 1971 obviously was not aided by the RCMP. Although 98% of the people in the rural detachment area were Aboriginal, and although the non-Aboriginal members of the rural detachment regularly visited the reserve communities, they were too busy to socialize or to get to know and understand those living in the Aboriginal communities.

There can be no question that the RCMP discriminated when dealing with Aboriginal people in The Pas in 1971. We heard of Aboriginal young people's being stopped by the police for no apparent reason. At times Aboriginal students were stopped when walking on the street and required to account for their actions. The same inquiries were not made of white students. This discriminatory conduct was probably so inbred that the officers did not notice that their conduct displayed prejudice and discrimination.

Citizens have the right to walk the streets without being stopped by the police because of their race or colour. It is discriminatory to stop and question an Aboriginal youth who is walking down the street, but not stop a white youth in the same situation. This differential treatment demonstrates that the RCMP allowed their behaviour to be influenced by racial stereotyping.

Grosenick testified that he and other officers had heard stories about white men throwing Aboriginal men off the bridge into the Saskatchewan River. Since no one ever complained to the RCMP, he said the stories were never investigated.

A number of officers told us they were aware of white youths' cruising the town, attempting to pick up Aboriginal girls for drinking parties and for sex. It was not the RCMP's practice to stop the cars to see if the girls were of age or if they were going willingly. Grosenick did not speak to anyone in the white community about the "cruising," nor did he attempt to issue any warnings to Aboriginal students, parents or others. He told us he felt there was nothing he could do because he assumed that the girls involved were of age and were willing participants. We know from the testimony of a number of witnesses that this was a mistaken assumption. One witness told us she drank in bars in The Pas when she was only 14. Several others also spoke of drinking in hotels while underage. Even if Grosenick were right, the RCMP should have discussed the matter with the families of the girls or with the people with whom they were staying. They should also have discussed these matters with the band chiefs and councils, and the Department of Indian Affairs.

We believe that the failure to investigate these allegations cannot be justified. Police should not simply investigate crime, they should prevent it. That the allegations were not investigated lends credence to suggestions that the RCMP were less than diligent when Aboriginal interests were involved.

The evidence indicates that, in the early 1970s at least, the RCMP failed to act to protect the Aboriginal community when it should have. The racism these examples illustrate is not the active or violent racism which has led to race riots in some communities. It is, rather, a passive racism or lack of concern based on ignorance and a lack of understanding of the other community. It results not in active expressions of racist invective but in a failure to act when all indications suggest that action is required.

It was into this town that Betty Osborne was forced to move in order to pursue her dream of becoming a teacher and of helping her people. Those dreams were shattered on a cold morning in November 1971.

The Suspects

The four men who were with Betty Osborne when she was killed came from diverse backgrounds. Lee Colgan was an 18-year-old student at Margaret Barbour Collegiate who worked part time at a local clothing store. He lived at home with his parents. His father managed the government liquor store and his mother was a music teacher. They were respected members of the community. An RCMP officer who knew Lee Colgan said of him:

> On the surface Colgan appears to be a quiet, polite young adult. However, I found him always to be calculating as if he was concerned just what he could get away with....
>
> When he is drinking Lee's bad side begins to show. He will do almost anything that comes to his head as a good idea at the time after which he always 'appears' to be sorry for his actions. (Exhibit 17)

Across the street from the Colgans was the home of salesman Frank Houghton and his family. In November 1971 James Houghton was 23 years old and lived at home while attending technical school. The Houghtons and the Colgans both had cottages at Clearwater Lake and Houghton had baby-sat Colgan as a child. Despite the difference in their ages they were friends.

Another friend of Houghton's was Norman Manger who, at 25, was the oldest of the four. Manger's mother was an Aboriginal woman who died when he was two years old. The boy didn't see much of his father when he was growing up. After completing grade 12, Manger worked at a succession of jobs in northern Manitoba and in Winnipeg. But by 1971 he had not been working for a year or so and had been drinking heavily. He didn't have a permanent home and by his own admission had "turned into a bum."

Like Lee Colgan, Dwayne Johnston was 18 in 1971. He had dropped out of high school to work for the CNR. He was also a member of a motorcycle gang which had frequent scrapes with the police. His parents had separated and he boarded with a local family. Johnston apparently had virulent views on Aboriginal people. We heard testimony, for example, that he frequently made racist comments to ridicule

Aboriginal students in his school classes. Colgan said of Johnston, "I've never seen anybody hate native people so much in my life."

These were the four men whom Betty Osborne was to encounter early in the morning of November 13, 1971.

CHAPTER 3

THE MURDER

The Cause of Death

Betty Osborne's body was found approximately 23 metres into the bush adjacent to the pump house at Clearwater Lake. The evidence showed that she had first lain to the west of some mounds of earth 12 metres from the edge of the bush. She was then dragged further into the bush to the place where she was found. The lack of any melting of the snow at this point suggests that Osborne was already dead when she was left there.

The photographs and the descriptions given by a number of witnesses make it clear that Osborne suffered a vicious beating, particularly to her face. This occurred either during the venting of some unimaginable fury or with the intent of making her identification impossible. Her clothing, other than her boots, was removed and hidden over 30 metres away, below some rocks on the breakwater which extends some 45 metres out into the lake. Obviously, her boots must have been off at one point and then put on again. Whoever murdered her acted in a brutal and bizarre fashion.

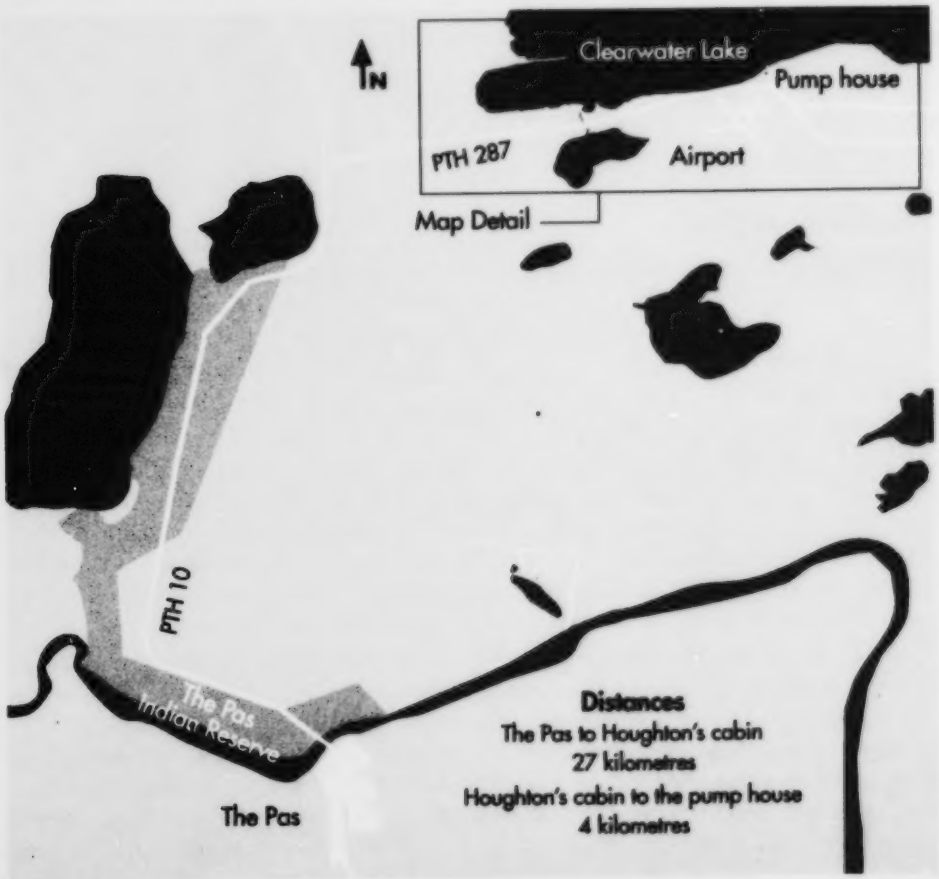
The autopsy report adds some details to what was obvious. Along with well over 50 stab wounds, her skull, cheekbones and palate were broken, her lungs were damaged, and one kidney was torn. Her body showed extensive bruising. The massive number of puncture wounds to the head and torso confirmed other evidence that was presented at the trial which suggested that a screwdriver was at least one weapon used. The other weapon or weapons presumably were hands or feet or some other blunt instrument. It is impossible to conclude, from the condition of the body, whether more than one sharp

object, such as another screwdriver, was used or exactly what else caused the injuries. Nor is it possible to say with absolute certainty at what point during her violation Osborne died. The autopsy did show that Osborne had not been raped during her ordeal.

The Activities of Betty Osborne before the Murder

At 6:00 p.m. on Friday, November 12, 1971, Betty Osborne arrived home for supper with Patricia Benson. An hour later, she went to St. Anthony's Hospital to visit a friend. There she met George Ross, an old friend whom she had known from her childhood visits to Cross Lake. Osborne phoned Patricia Benson to ask if she could bring Ross home for a visit. Ross and Osborne bought some beer and together they went to the Benson home and sat talking and drinking until 10:00 p.m., when Patricia Benson asked them to stop. At 10:30 Osborne asked if she could go to the store and Benson agreed.

Osborne and Ross went to the downtown area of The Pas. She passed by the lobby of the Cambrian Hotel where she saw her boyfriend, Cornelius Bighetty, with some of his friends. At this time, around 11:00 p.m., Osborne and Bighetty argued because Bighetty



was with another woman. This argument was to result in his becoming a suspect when the RCMP began their investigation. At 11:10, Osborne and Ross left the hotel lobby and went to the Northern Lite Cafe where they sat with other friends.

From the cafe, Ross, Osborne and two of their friends, Eva Simpson and Marian Osborne, went to a shed in the Bensons' yard where they drank beer. Shortly after midnight, first Marian Osborne and Simpson, then Ross and Betty Osborne, left the shed to return to the downtown area of The Pas. At 12:30 Ross left Osborne and went home. It is not known what Osborne did in those last few hours of her life. She was seen passing the Cambrian Hotel at 12:45 and later seen at a dance at the Legion at approximately 2:00 a.m. At 2:15 in the early morning of Saturday, November 13, 1971, Rebecca Ross, a long-time friend, saw Osborne walking west on Edwards Street away from the dance. Apart from Colgan, Houghton, Manger and Johnston, she was the last person to see Betty Osborne alive.

Although Osborne had consumed some beer during the evening, Colgan's evidence makes it apparent that her judgment was in no way affected. She did not want to accompany the men and made this very clear. Her conduct, again as described by Colgan, indicated that she did not wish to get into the car with the four, resisted being there and resisted their advances throughout the evening up until her death. It is absolutely certain she was an unwilling participant in the events of that night.

The Activities of Johnston, Houghton, Colgan and Manger

Our knowledge of the movements of James Houghton, Lee Colgan, Norman Manger and Dwayne Johnston that evening is pieced together from the testimony of Colgan, the trial evidence and information in Constable Urbanoski's report to the Inquiry.

At 8:00 p.m. on Friday, November 12, Colgan borrowed his father's car, a white, 1967, two-door Chrysler, and went driving around The Pas. He picked up Houghton and Manger. The men purchased beer and continued to drive around the town. After the beer was finished they broke into a friend's apartment and took some fortified wine.

1 - Eyeglasses **2** - Houghton's cottage **3** - Gloves, brassiere pieces
4 - Screwdriver **5** - Betty Osborne's body discovered

Manger. The men purchased beer and continued to drive around the town. After the beer was finished they broke into a friend's apartment and took some fortified wine.

By the early hours of the morning the men were looking for more excitement. Houghton, Manger and Colgan visited the dance at the Legion, where they drank beer with some other men in the washroom. The three returned to the car and continued "cruising." It was probably during this time that they picked up Dwayne Johnston.

Houghton was driving. Manger was in the passenger side of the front seat. Colgan was behind Houghton and Johnston was seated behind Manger. Colgan's evidence was that they had formed a common plan to find an Indian girl with whom to drink and have sex.

Driving along Third Avenue, they saw a lone Indian female walking. This is close to where Osborne was last seen alive. We do not know if someone suggested they stop and pick her up or if Houghton did that on his own initiative. If someone else made the suggestion, at least Houghton complied and it was he who pulled the car alongside and then stopped beside her. There is nothing to indicate that any of the occupants of the car recognized the woman as Betty Osborne.

The men attempted to convince Osborne to go and "party" with them. She refused and Manger opened the door to let Johnston out of the car. Johnston then pushed Osborne into the car and she was driven away. Houghton drove 24 kilometres to his parents' cabin at Clearwater Lake. Confined in the back seat of the car between Johnston and Colgan, Osborne was assaulted, sexually and physically. The two men ripped her blouse and grabbed at her breasts. At the cabin, Osborne was dragged from the car and attacked by Johnston while the others stood around drinking and watching. Others may have assisted in the beating. In his statement to the police on March 10, 1987, Colgan admitted that he assisted Johnston when he was beating Osborne at the Houghton cabin.

When they became concerned that others in the area might hear her screams, Johnston and Colgan forced their victim into the car once more. Houghton drove several kilometres farther away from town in the direction of the Guy Hill Residential School along Provincial Highway 287, to the pump house where the final assault and the murder were committed. There, if we are to believe the testimony of Colgan, Johnston alone pulled Osborne from the car and commenced the final assault upon her while the other three sat in the car and continued to drink.

Colgan told the preliminary hearing and the trial that while he, Manger and Houghton were sitting and drinking in the car at the pump house, he could hear banging against the side and rear of the car. Colgan said at the trial that he assumed Osborne was being beaten. After what Colgan at the trial guessed to be "five to ten minutes," the banging stopped. At some point, Houghton got out of the car. The evidence of Colgan at the trial was that at this time Osborne was still alive. The dome light in the car came on as Houghton left the car and, Colgan said, "I got a fast glimpse of her and I didn't think she had very many clothes left on." Colgan's evidence further suggested that after some minutes, Johnston returned to the car, leaving Houghton outside with Osborne. We do not know precisely what Johnston said at this time since Colgan's testimony varied on this point. Johnston, having found a screwdriver under the front seat, once more left the car.

Shortly after this, Colgan climbed over the front seat into the driver's seat and turned the car around. He claimed he called out twice to Houghton and Johnston that he was leaving. After the second time, Colgan said, he heard the response, "Just a minute." The evidence given by Colgan suggested that soon after this, Johnston and Houghton returned to the car and one of them announced, "She's dead."

Colgan drove away from the murder scene back along Highway 287 toward town. He told us he remembered that the screwdriver was wiped off and thrown from the car.

When the men reached The Pas, Colgan said that at least he and Houghton went back to the dance at the Legion, where they stayed for perhaps half an hour. We do not believe that they did. It is more likely the dance was over by this time.

In his testimony at the trial of Houghton and Johnston, Colgan stated that when he and Houghton parted that night, they agreed to "keep it quiet." The next morning, Colgan stated, he washed blood off the back of the car and, looking inside, noticed a small stain on the back seat. Colgan's evidence at the trial of Houghton and Johnston suggested that over the few weeks following, the four made a pact not to speak about Osborne's murder.

The Early Evidence Connecting Johnston, Houghton, Colgan and Manger to the Murder

No one but the four men in the car knows exactly what happened that night. The men maintained their pact of silence and for 15 years the police were unable to put together sufficient evidence in order to lay a charge. The investigation was hampered in its early stage by significant police errors. In its middle stage the investigation was allowed to become dormant. When it was renewed with vigour by Constable Urbanoski in 1983, a pattern of evidence emerged to link the men to the abduction of Betty Osborne. But even then the admissible evidence which could be used to support charges was not strong. In this section we will review the evidence, and what it reveals about the actions of the men on the night of the murder and about their behaviour in the years that followed. These are the facts which the police tried unsuccessfully for so many years to uncover and put together into a case against the four.

In Chapter 4 we will examine the various stages of the police investigation which produced this evidence.

Brian Johnson, a 17-year-old acquaintance of the men's, told the police he had been in the Colgan car at about 1:30 in the morning of November 13 with Colgan, Manger, Houghton and Gordon Buck, another acquaintance. Johnson said he had got out of the car because Colgan was too drunk to drive. Later, Houghton took over the wheel.

Johnson told police that he last saw the car with Colgan, Houghton and Manger in it some time around 2:00 a.m. It was only shortly after this, at 2:15, that Rebecca Ross saw her friend Betty Osborne for the last time.

Some time after 4:00 a.m. that same morning, Philip McGillivary, a taxi driver returning from dropping two customers at the Guy Hill Residence, followed a car along

Highway 287 between the pump house and the turn-off to the Houghton cottage. McGillivary told the police on November 17, 1971, that the driver obviously was drunk and was "zigzagging all over the road." As he came closer to the car, he felt he couldn't pass because it "was all over the road." When the car turned to enter the road to the Houghton cottage, it almost went into the ditch. McGillivary also noticed something with red spots on it on the road about a quarter mile west of the entrance to the airport. In a later statement to police on December 1, 1971, McGillivary described this as a paper or rag with red spots on it. Under hypnosis, McGillivary later remembered four of the six characters in the car's licence plate. These closely matched the licence number of the Colgan Chrysler.

When they came to examine Colgan's car, seven months later, the RCMP found a small spot of human blood on the back seat of the car. Under the rear seat they found a piece of brassiere clasp which at one time was part of the brassiere found the day after the murder alongside Highway 287. The police also found under the rear seat some human hair "with similar characteristics" to Osborne's hair. None of this evidence, however, was linked conclusively to Osborne.

The only statement made by the suspects and known to the police by the end of 1972 was an admission made by Colgan to Cpl. Keith Duncan to the effect that he had been at the scene but had done nothing. He gave no details of who else was present or what was done.

The Evidence against Johnston

The evidence against Dwayne Johnston was that provided by Lee Colgan after he was granted immunity from prosecution in 1987. In addition, there was an admission made by Johnston at a party in the spring of 1972 which did not come to police attention until 1985.

Colgan's evidence placed Johnston in the car at the time of the abduction and described his assaults on Osborne both in the car and at the cabin. It placed Johnston alone with Osborne outside the car at the pump house when there was noise of banging against the car, and told of Johnston's coming back to the vehicle to obtain a screwdriver. Colgan's evidence also spoke of Johnston's final return to the car and the announcement, "She's dead."

Additional evidence against Johnston came from a woman who testified at his preliminary hearing and trial, and also before us, about references he had made to his involvement in a murder. When she appeared before us the witness was concerned for her safety and asked not to be identified. Consequently, we will refer to her as Unidentified Witness #1. She said that one evening when she was 14 she had gone to the home of an acquaintance. Six people were there drinking beer and talking when the witness arrived, and perhaps 12 were present by the time she left, approximately half an hour later. Among those at the gathering was Dwayne Johnston. The witness told the court that at one point in the evening Johnston stood up, made stabbing motions and said, "I picked up a screwdriver and I stabbed her, and I stabbed her, and I stabbed her." And then he laughed. The witness said that shortly after Johnston was heard to say, "Do you

know what it feels like to kill someone? It feels great." At the time, this witness was threatened immediately by a friend of Johnston's and told never to mention what Johnston had said. She did not come forward until the RCMP placed an article in the *Opasquia Times*, seeking information.

This evidence in and of itself did not implicate Johnston in the crime since the name of Betty Osborne was never mentioned, nor were the date, place or event identified. There was no direct link between any of the evidence against Johnston and Osborne's murder. Nor, at the time of his arrest, was there any other admissible evidence linking Johnston to the murder. The police had learned Johnston's name from an informant who had heard rumours around town. Rumours are not admissible in a trial. Colgan's evidence, given after his immunity in 1987, was what linked Johnston clearly to Osborne's murder.

Johnston, as is his right, did not testify at his trial for the murder of Betty Osborne, nor did he ever make a statement to the police. When called before the Inquiry, he refused either to be sworn or to give unsworn testimony. He was aware that previous testimony both at the trial and at our hearings indicated that he was primarily responsible for the murder. We urged him to avail himself of the opportunity to tell his side of the story. He remained adamant that he would not testify.

Johnston's refusal to testify has had certain consequences which are worth noting. We have only one version of the events of that evening: that of Colgan. Colgan's evidence may, of course, be self-serving, but he laid blame firmly on Johnston's shoulders. Johnston knew that. As we will comment later, we suspect that Colgan changed his evidence at the trial somewhat to assist his friend Houghton, but we have no way of knowing to what extent. We do not, however, think that he changed his testimony so as to place more guilt on the shoulders of Johnston than should properly be there. Colgan's story has not varied in portraying Johnston as the main instigator of Osborne's murder.

As far as our examination of the facts is concerned, Johnston's refusal to testify before us leaves Colgan's version of the events unchallenged. Johnston's failure to refute Colgan's testimony allows us to conclude that it generally is accurate in relation to Johnston's role. It reinforces the correctness of the jury's decision in convicting Johnston.

The Evidence against Manger

Colgan's evidence was that Norman Manger was heavily intoxicated the evening of Osborne's murder. Manger himself has said he was so drunk that he has very little recollection of the events of the evening. At the trial of Houghton and Johnston he admitted being in the car with Colgan, Houghton and Johnston. He claimed neither to remember how much he had had to drink when he got into the car, nor how much he had while he was in the car.

The police questioned Manger a number of times during the 16 years of the investigation. Until he agreed to testify at the trial of Houghton and Johnston, he denied having any knowledge of the murder. On June 6, 1972, when first questioned about the night of Osborne's murder, Manger gave an alibi that he admitted later was false.

It was not until November 11, 1987, just before the start of the trial of Houghton and Johnston, that Manger admitted being in the car that night. In his statement that day Manger told the police:

> I was pretty drunk that night. I ended up at the dance. Somehow I ended up going for a ride. There were three other guys there with me. There was more liquor being drunk at this time also. I don't recall picking up the girl or where she was picked up. I imagine she was picked up in town. The next thing I can remember is her being pulled through a snowbank. It was dark and I had this terrible feeling of oh, my god, what's happened here. I got this awful fear and I covered my ears or something and tried not to think about what was happening. I was in the front seat on the passenger side. (Exhibit No. 27, p. 1)

Even though he finally did admit that he was there in the car that evening, Manger still insisted at the trial and before us that he had no recollection beyond that. He did acknowledge before us that he learned something more of the events of that evening through other people and through rumours that were circulating in town.

Manger's evidence as to his role that evening is consistent with that of Colgan. Colgan's evidence at the trial of Houghton and Johnston placed Manger in the car and drunk from the time when Osborne was picked up until the time she was killed. Colgan also said that when the assault was taking place, Manger was cowering under the dashboard of the car.

We are not convinced, however, that Manger has told us all that he remembers of that night. Colgan's evidence was that it was the intention of all four to pick up a girl with whom to have sex. This implicates Manger in the abduction only if he were able to form the "intention" to commit the act. When he talked with Const. Hank Moorlag in September 1972, Manger at one point seemed willing to talk about what happened at the lake and to take a polygraph test. He was not prepared to talk about what had happened earlier in the evening. While we do not know what he might have said, since he changed his mind after seeing his lawyer, D'Arcy Bancroft, before the police could administer the polygraph, his attitude suggested he knew more about events than he told. It also suggested he was not being truthful when he denied any recollection of the events of the evening.

Because he was willing to discuss the murder with Moorlag, presumably Manger knew little about it, and because he was unwilling to talk about the abduction, it seems likely he knew more about those events than he led us to believe.

The evidence against Manger placed him in the car. He apparently agreed to pick up a woman for sex and, as the passenger in the right front seat, probably had to open the door and move his seat forward to let Johnston out, and to let him and Osborne back in. There is, however, no evidence other than his presence to implicate him in the actual beating. We have heard no evidence that he laid a hand on Osborne or did anything to cause her death. He was present in a drunken state.

The Evidence against Colgan

Colgan told a number of people about his presence during the abduction and murder. In November 1971, very shortly after the murder, he told Catherine Dick of his involvement and mentioned the names of Houghton and Manger. Colgan said that a fourth man was involved but Dick did not remember his name. It was Dick who in May 1972 sent the anonymous letter to police which first gave them the names of three of the participants. In the spring or summer of 1972, Colgan told a young woman, who preferred not to be named when testifying before us, that he and some others "picked up that squaw at the Cumberland Block" and had taken her out to the lake for a "gang bang." There, he told this informant, Johnston had stabbed the victim with a screwdriver.

In September 1972, when questioned by Corporal Duncan, Colgan admitted that he had been at the scene but said he had done nothing.

Colgan obviously had told his father something by September 1972 since Bud Colgan admitted to Cpl. Denys Stewart and Cpl. Charles Koppang at that time that his son knew what had happened but, in Stewart's words, had "not laid a hand on the girl."

Before Colgan's marriage in 1973, his mother insisted that he tell his prospective wife of his involvement in Osborne's murder. In 1976, Arlene Demmings, who was by then separated from Colgan, told the police that during their three-and-a-half-year marriage, he often spoke of the murder when he was drunk.

In the summer of 1977 or 1978, Colgan discussed the murder with Sheriff Gerald Wilson. The two had met at the Legion clubroom and later went outside to Wilson's camper for a drink. Colgan was upset because a man whom he assumed was a police officer had been sending Screwdriver drinks over to his table. During their conversation Colgan gave Wilson details of the abduction of Betty Osborne and confirmed the identity of the other men in the car when she was picked up.

In 1978 or 1979 Colgan also told Kathy Phillips, a civilian employee of the RCMP, about the murder and that he had been in the car. Moorlag, who retained an interest in the file following his first work on it in 1972, told us that there were other informants who had heard admissions from Colgan but who would not agree to testify in court.

As far as we are able to determine, in all these statements, Colgan claimed that although he was there, he had done nothing. Annette Veito gave a statement to the police in which she said that on December 1, 1984, Colgan said to her, "I can tell you exactly what time she died and where." Veito told the police that Colgan added that he, Houghton, Manger and Johnston had picked up Osborne at the Cumberland Block near the Legion. She told the police, "He told me that they had killed her at the airport and then went to the pump house." Manger, he told her, was passed out in the back at the time. In this statement too, Colgan suggested that he remained in the car while the murder took place. Veito told the police that Colgan said, "Dwayne came back for the screwdriver."

Veito did not testify on this point at the preliminary hearing and did not testify at all during the trial. It seems that her reliability was suspect due to inconsistencies in her recollection. She remembered being stopped by a car and talking to the occupants on the evening of the murder around the same time as Brian Johnson saw them. She,

however, believed that it was Colgan's brother, Rick, driving his own car with Houghton, Manger and Johnston as the occupants. Clearly, she was mistaken on several points regarding the car and who was in it. It was Colgan's father's car that Lee Colgan was driving with Houghton and Manger as passengers. None of Colgan's admissions implicates him directly in Osborne's murder. His statement to Veito strongly suggests that he knows much more than he has admitted, but it does not contain an admission that he participated in the murder.

Colgan was charged with murder on October 3, 1986, but did not stand trial. Just before he was scheduled to appear at his preliminary hearing to determine if the case should come to trial, Colgan sought, and was granted, immunity against prosecution for "any offence in any way related to the murder," in return for his testimony at the trial of Houghton and Johnston. Until his immunity and subsequent statement, Colgan did not admit circumstances that might have led to charges relating to the abduction of Osborne and the manner in which she was treated in the car. Colgan's only earlier admission was that "he was there."

The Evidence against Houghton

Houghton, to the best of our knowlege, has never made any admissions regarding the events of November 12 and 13, 1971. Until Colgan agreed to testify, the only evidence linking Houghton to Betty Osborne's murder was the fact that Brian Johnson and Annette Veito placed him in the Colgan car on the evening of November 12. That would not have been sufficient to support charges or a conviction against him.

In some of his statements to others, Lee Colgan had mentioned Houghton's name, but such evidence could not have been used against Houghton. It has long been the law in Canada that the statement of one accused person can be used only against him or her and not against others. Colgan's many admissions would have been evidence only against him and not against the other men.

At the trial of Houghton and Johnston, Colgan told the court that the day after the murder he met Houghton and the two of them discussed the events of the previous evening. Colgan was asked what was said. He replied, "Just that we should keep it quiet for now." Manger said much the same thing. After he had told the court that he and Colgan had agreed to "keep it quiet," he was asked if he had spoken to Houghton about the incident and what had been said. He replied, "It was similar to the same thing, just like we were all in it even if it's circumstantial, the evidence—kind of like it happened, but just to keep it quiet, I guess." Apart from this, there is no evidence that Houghton ever talked to anyone about his role in the abduction and murder of Betty Osborne.

Like Johnston, Houghton did not testify at his trial. When he was called before us, his answer to all the questions about his activities that evening was that he had "no recollection." He did not deny that he was involved; he would say only that he did not remember. At no time did he say that he was not there or that he was not involved in the murder. The evidence of Houghton was much more revealing than he intended it to be. Clearly, he was unwilling to challenge Colgan's testimony.

It was not only in relation to the events of that night that Houghton claimed his memory was faulty. He said he could not remember speaking with D'Arcy Bancroft, the lawyer who claimed to be representing him after he had become a suspect. He said he could not remember signing the letter which Bancroft sent to the police on September 26, 1972, demanding that the police desist from "harassing" Houghton. He also would have us believe that he remembered nothing of his discussions with the RCMP about taking a polygraph test on September 25, 1972. He displayed a good memory of other matters but suggested he has no memory of any matter even remotely connected with the murder or the events that followed.

He claimed that, although he knew he was a suspect in the murder along with Colgan, Manger and Johnston, he at no time discussed the murder with the other suspects and made no inquiries about the incidents of that night. We do not believe him. Nor do we believe that he has no recollection of the events of that night. We are satisfied that Houghton was there during the abduction and murder of Osborne. We are satisfied that he knows what happened that night and that his claim to have no recollection of that night was a complete fabrication.

Colgan's evidence was that Houghton was the driver of the car which pulled over next to Osborne. Houghton was a party to the plan to take Osborne to the lake for sex. Colgan said that it was Houghton who drove the car out of town, to his parents' cabin, and then to the pump house. From Colgan's evidence at the trial it is clear that Osborne was alive when Houghton got out of the car at the pump house, and dead when he got back in. The drag marks and footprints on each side of the body made it clear that two people dragged Osborne to the spot where she was left.

The jury acquitted Houghton of the charge of murder. The reason he was acquitted is not known and the law forbids anyone from asking a juror why a particular decision was reached. We assume that either the evidence satisfied the jury that Houghton was not a party to the murder, or that they were not satisfied beyond a reasonable doubt that he was. An unwillingness to rely on the evidence of Colgan may have been a factor. Regardless, he has been acquitted of murder and can no longer be tried on that charge. We will consider later whether the evidence could have supported other charges against Houghton.

Conclusions

Much of the evidence about what occurred that night comes from Lee Colgan, an admitted alcoholic, drug-abuser, wife-beater and thief. There is reason to question the testimony of such a witness and we have looked carefully at all that he has told us. We do not hesitate in saying that we believe that Colgan was not fully forthright and honest in his testimony before us or at the trial of Houghton and Johnston. We believe that Colgan was less than truthful in describing his role and that of Houghton during that night. We do not believe that Betty Osborne's treatment and injuries came at the hands of one man alone. We accept Colgan's evidence about Johnston's actions that night but we believe that Colgan has withheld facts from his testimony about his and Houghton's actions that night.

What is clear from the evidence is that all four men decided to pick up an Indian woman for sex. They approached Betty Osborne. When she refused them, she was

abducted. In the car she was physically and sexually assaulted by at least Johnston and Colgan. At the Houghton cabin the beating continued with Johnston and one or two others involved. At the pump house where the murder took place, Johnston and Houghton got out of the car. All four men participated to some extent in the events leading up to the murder. Manger may have been so intoxicated that he could have avoided a criminal conviction for his involvement, but all four men are morally, if not legally, responsible for Betty Osborne's murder.

We do not believe that it was Johnston alone who assaulted Osborne at the pump house, dragged her into the bush, hid her clothes and left her. We believe that at least one other person assisted Johnston while he was out of the car at the pump house. The first officers at the scene of the crime remain convinced that two persons dragged the victim into the bush. There were many tracks of footprints from the parking place of the car to the place where, apparently, it was first intended to leave the body of the victim. The evidence was that two sets of bloodstained footprints led back from the place where the body was finally left to the place where the car had been parked. All this suggests that more than one person participated.

In Chapter 7 we will discuss the Crown's decisions with regard to the laying of charges against the four men.

CHAPTER 4

THE INVESTIGATION

An Overview of the Investigation

The investigation of the murder by the RCMP seems to have had three stages. The first, which lasted from the discovery of Osborne's body until the end of 1972, was a period of considerable activity during which the four suspects were identified. The first phase came to a close at the end of 1972, when the police concluded they were unable to gather enough evidence to lay charges.

The second phase lasted from 1973 until 1983. Although the file was reviewed from time to time, and Lee Colgan and Norman Manger were interviewed occasionally, not much was accomplished during this period. The file appears to have remained essentially dormant.

The third phase began in 1983 with Const. Robert Urbanoski's review of the file. He reinterviewed all those previously questioned. On June 12, 1985, he placed an article in the *Opasquia Times* which resulted in the discovery of new and incriminating evidence. When Colgan was charged on October 3, 1986, extensive news media coverage throughout western Canada resulted in further evidence coming to light. Johnston was charged on October 27, 1986. In March 1987, when Colgan offered to give evidence in return for immunity from prosecution, the police were able to charge Houghton. In December 1987, 16 years after the murder, a jury convicted Johnston and acquitted Houghton.

While the investigation appears to have been followed with enthusiasm in the first phase, it seems to us that that enthusiasm waned rather quickly. The fact that in the third

phase Urbanoski completed the investigation with some alacrity causes us to question why the RCMP allowed the case to slip from attention at the end of 1972. The advertising used in 1985 could have been undertaken as easily in 1972. It may be that the young witnesses might not have responded at that time but the effort could have been made.

Despite the flagging attention of the RCMP the major cause of the 16-year delay does not appear to have been a lack of police activity. It is our opinion that the major factor was that those who knew what had happened did not or would not speak to the police. The simple fact is that this was a difficult case to bring to court.

RCMP Resources

The RCMP had two detachments in The Pas at the time of the murder. The rural detachment consisted of nine officers and the town detachment had 13. Both fell under the Dauphin Sub-Division, which provided detachments with support services including Identification Services, a General Investigative Section member and a plainclothes officer. Another GIS member as well as another plainclothes officer stationed at Thompson were also available to The Pas. The rural detachment of the RCMP was in charge of the investigation. It would appear that the rural detachment made extensive and appropriate use of the extra resources and personnel available to it.

Hundreds of officers worked on the file over the years; more than 50 in the first year alone. Urbanoski gave us a list of 29 officers who worked on the case in The Pas in the first year of the investigation. Officers across the country also worked on the file, checking cars, doctors, hospitals and lists of suspects, and performing other investigative tasks.

The First Phase of the Investigation

Fourteen-year-old Kenneth Gurba, his father Steven, and Danny Yakiwchuk arrived at the pump house on Clearwater Lake to go fishing on Saturday, November 13, between 9:00 and 10:00 a.m. They set up on the shore at the end of the breakwater at the pump house. Having tired of fishing, the boy wandered off into the bush looking for rabbits. At approximately 11:30 a.m., as he was returning to the parking area around the pump house, he noticed something in the bush. The bush was too thick to allow him to discern what it was he had glimpsed, so he went out to the parking area and then back in from another direction. There, he discovered the body of Betty Osborne. He informed his father, and they went to the nearby airport to call the police. If it had not been for young Gurba's chance stroll, it is likely Osborne's body would not have been discovered until the following spring. Indeed, it might never have been found.

Kenneth Gurba and his father returned from the airport accompanied by Staff Sgt. Robert Ayers, an RCMP pilot in charge of the Air Division stationed there. Ayers testified that when he entered the bush he did so by walking in the boy's footprints. After viewing the body, he sent the Gurbas back to the airport to call the RCMP detachment in The Pas. He then awaited the arrival of other officers.

Sgt. Larry Grosenick, an officer with 20 years of service, was then in charge of the rural detachment at The Pas. He arrived at the scene accompanied by Const. Ken

Morrison. By 1:45 p.m. more officers had arrived, including Cpl. John Fitzmaurice, the head of the General Investigative Section in Dauphin; Cpl. Harold Bielert, the identification specialist from Dauphin; as well as Const. Thomas Boyle and Const. Donald Knight from The Pas rural detachment. The officers from Dauphin (Fitzmaurice and Bielert) happened to be in The Pas investigating other matters. Grosenick, as the senior officer, took charge of the investigation. Knight was placed in charge of recording the scene and collecting the physical evidence. Bielert was given responsibility for taking photographs and measurements.

Boyle was placed in charge of the body and at 4:03 p.m it was moved to the morgue at St. Anthony's Hospital in The Pas. According to Boyle's records, 31 persons, including taxi drivers and residents of The Pas Reserve, attempted to identify the body between 5:15 p.m. and 4:05 a.m. of the next day. None was able to do so. At 9:55 p.m. on November 13, William Benson, at whose house Osborne was boarding, came to the morgue but could not identify her positively because of the condition of the battered body.

Earlier in the day Benson had reported Osborne missing. When he was unable to identify her at the morgue, the police went to his home and took fingerprints from one of her schoolbooks. Using these fingerprints, at 10 minutes after midnight on November 14, 1971, the police positively identified the body of Betty Osborne.

Meanwhile, the police had been continuing their work at the murder scene. Thirty-six exhibits were gathered at the murder scene and about 120 photographs were taken. Blood samples were taken and analysed. Footprints were examined, photographed and compared. The imprints left by the tires of an automobile also were examined and photographed. The whole area was measured and mapped.

Some criticism can be levelled at the manner in which the evidence at the scene was preserved and gathered. Bielert had been in The Pas taking photographs of suspected drug traffickers. The equipment he had brought with him from Dauphin for that purpose was not well suited to taking photographs of footprints and tire tracks in the snow. Because his camera was not equipped with a built-in light metre, he failed to adjust for the fading light and did not use a flash to illuminate the area. Consequently, some of the photographs lacked detail. Bielert maintained that the footprints themselves, because of the snow conditions, were not good enough to serve for identification purposes. Because of the poor quality of the photographs, we cannot verify that. The photographic record of the footprints could have been much better.

Bielert also failed to record carefully all the footprints which were at the scene. While he traced all those leading from the pump house to the place where Osborne's body had first been placed in the snow, he did not clearly record the footprints on each side of the drag marks from that spot to the final resting place. The defence lawyers at the trial of Houghton and Johnston made much of this failing. Neither did Bielert map the path used by Kenneth Gurba and Staff Sergeant Ayers when they viewed Osborne's body. It is our opinion that these oversights were crucial and ultimately detrimental to the prosecution. It is possible that a better record of the tracks and footprints at the scene would have given the police and any prospective judge or jury some help in reconstructing the sequence of events at the murder scene. The incomplete mapping

of the scene clearly caused confusion at the trial, particularly over the question of whether one or two people were involved in moving the body.

Other physical evidence was found. At 1:15 p.m. on November 13, the same day as the murder, a passing motorist picked up a screwdriver he had found in the middle of the highway a few hundred yards west of the pump house road. This screwdriver has not been linked directly to the murder. On November 14, Const. Don Knight retrieved a pair of gloves, two pieces of a brassiere and a bloodstained paper bag from the ditch on the north side of the same highway. Later that same day, a police dog discovered another screwdriver, this one bloodstained and presumed to be the murder weapon, close to where the gloves and the brassiere had been found earlier. Seven months later, in June 1972, a local resident walking her dog discovered Osborne's glasses in the ditch on the south side of Highway 287, close to the turn-off to the Houghton cottage.

With the initial stages completed, the search for the murderer began. Much of the RCMP's early attention was focussed on Osborne's Aboriginal friends, but other leads were pursued as well. Because The Pas was a town with a large transient population, the investigation involved hundreds of police all across the country checking out people who had left the town shortly after the murder. The viciousness of the crime suggested to the police that the murderer or murderers might have been drunk or drugged. The police also suspected that Osborne might have fallen victim to someone with a history of violent or sexual attacks. The Crime Index Section in Winnipeg conducted a search of its records for persons who may have committed similar crimes. The RCMP checked local beer-vending outlets, hotel and motel registers, as well as employment and welfare records. They also checked with federal and provincial corrections departments to see if any dangerous prisoners had escaped recently. All the information gathered was examined by the Crime Index Section to see if any likely suspects had been in The Pas at the time of the murder.

The owners of the cottages close to the scene were contacted to ascertain if they had seen anything which might assist the investigation. Within three days of the murder, a circular had been sent to police departments across the country. Over 1,000 persons were checked before the year had ended. All were eliminated from suspicion.

From the outset, the RCMP attempted to trace Osborne's movements in the hours before her death. They interviewed her friends and others who may have seen her that night. The RCMP were aware that the possibility existed that Osborne had been murdered by friends or acquaintances. No links to the murderers were uncovered in those interviews. Indeed, all Osborne's friends and acquaintances were eliminated quickly from suspicion.

A number of what turned out to be false leads consumed some of the time of the RCMP. A bloodstained shirt had been found along the highway to the pump house. The size of the shirt, and the fact that it was rather dirty, led the police to suspect that a "person(s) unkempt in appearance, slim build and in the 135 to 150 lb. bracket" might have committed the murder. This shirt, the origin of which was never traced, is now believed to have had no relation to the murder.

Police also spent time attempting to trace the origin of the screwdriver which had been found along the highway near the pump house. This screwdriver, picked up by a

passing motorist the day of the murder, had a name which appeared to be "Hanson" or "Ranson" or something similar engraved on it. The owner of the screwdriver, which has never been ruled out as a possible murder weapon, could not be traced.

One person came forward and told the police in The Pas that she had seen a woman kill Osborne. After this story was proved to be false, two other rumours surfaced. One suggested that Osborne had been killed by three or four girls, and another that she had been killed by a lunatic who was passing through town. A fourth rumour later suggested that a person who committed suicide had left a note naming three of the murderers. All these rumours were checked and found to be groundless.

Identification of the Car

On the same day as the murder the RCMP received some important information regarding the possible murder vehicle. Taxi driver Philip McGillivary told Constable Boyle that on November 13, at about the time of the murder, he had followed a car west on Highway 287. He said that the licence contained the numbers 42. The RCMP issued an information circular on November 16 indicating that the first two numbers were 42 and that the vehicle was dark in colour. However, in a brief statement to police on November 17, McGillivary said the vehicle he saw after 4:15 a.m. was light blue in colour. At some point, he apparently also told the police that the licence plate contained the letter "B" and the numbers 35 or 53 in addition to the numbers 42.

The next information circular, distributed by the RCMP on November 24, 1971, contained this information:

> A vehicle described as dark in colour, bearing a Manitoba license plate containing the letter "B" and the numbers 42, was seen in the area of the offence at approximately 3:00 a.m. of Saturday, 13 Nov. 71. (Exhibit 11)

There seems to be no satisfactory explanation as to why the circular described the vehicle as "dark in colour" when McGillivary had told police that it was light blue.

When McGillivary was interviewed formally on December 1, 1971, he said 42 were the last two numbers. He again described the colour as light blue and he stated quite clearly that he never told the police that the plate contained the letter "B" or that the number may have contained 35 or 53. He also said that the car that he saw after 4:00 a.m. was not one he recognized as being from The Pas. On the basis of McGillivary's information the RCMP obtained two separate computer print-outs from the Motor Vehicle Branch, each containing over 2,500 vehicles with similar numbers.

Some days later the officers working on the case decided to attempt to use hypnosis with McGillivary to see if he could remember more about the car. An appointment was arranged in Saskatchewan for December 12, 1971. Under hypnosis McGillivary remembered the licence number as 5342. He still did not recall any letters. The RCMP again checked with the Motor Vehicle Branch and found that the list of possible vehicles had narrowed to 28. Among those was the licence BN 5342, registered in the name of Harold "Bud" Colgan, the father of Lee Colgan. It was the only car from The Pas on the list.

Despite some apparent confusion over the appearance of the car, the time it was spotted and the numbers of its licence plate, Philip McGillivary had some valuable evidence to offer police. Had it been handled better, within the first couple of days after the murder the RCMP could have placed the Colgan vehicle near the scene of the crime.

The poor handling of McGillivary's evidence by The Pas detachment was then followed by a major mistake. Rather than immediately seizing and examining the Colgan vehicle, the rural detachment decided to do nothing, relying instead on information that a member of the town detachment had inspected the car in a routine check one evening around the time of the murder. According to Urbanoski, the constable who conducted the spot check had reported only that he had looked in the back seat, had seen nothing unusual, and that he knew the operator of the vehicle. The operator was Lee Colgan.

The RCMP were not certain when that check took place. No record of the check can be found. It could have been conducted as early as the night of the murder. It could even have happened before the murder occurred. Const. John Lyons, who checked the car, told us he didn't think he knew there had been a murder when he looked at the car, and he stated quite firmly that he did not know at the time that Colgan might have been a murder suspect. It now appears obvious that the check was not related to the murder at all and was not connected to the province-wide request to check cars with the numbers 5342. It is difficult to understand why the rural detachment would refrain from what would be a normal follow-up on the excellent work they had done just because an officer from the town detachment seemed to "vouch for" the owner of the car. No effort was made to do what had been requested of other detachments—to determine the whereabouts of any vehicle with the numbers 5342 in the licence on the night of the murder.

Sergeant Grosenick, as the officer in charge of the rural detachment of the RCMP at The Pas at the time of the murder and the officer in charge of the investigation, must be held responsible for this considerable error. He said that he believed that the automobile was examined adequately in December 1971. When shown Exhibit 17, a memorandum from Constable Lyons of the town detachment indicating the cursory nature of the examination of the vehicle conducted by Lyons in November, Grosenick agreed that that type of examination would not be sufficient. He acknowledged that once police were aware of the licence number and the possible involvement of this vehicle, a much more intensive examination was required. In spite of Grosenick's belief that a detailed examination of the vehicle took place in December 1971, we are satisfied from the records and the memories of other officers that no such examination of the vehicle took place in December.

The failure to check the Colgan car adequately represents a very serious flaw in the investigation. The fault in the first instance must lie with Grosenick, since he was the officer in charge. By 1971, he had been in the RCMP for 20 years and had worked on approximately 15 serious investigations involving death, half of which were murder or manslaughter cases. We had the impression, nevertheless, that this particular investigation taxed his investigative and administrative capacity. As the officer in charge, he should have made certain that all possible leads were pursued exhaustively. Grosenick has not explained this failing adequately.

Grosenick admitted to us that he had some "personality differences" with the officer in charge of the town detachment at the time. We were led to wonder if the lack of a

good working relationship might have contributed to the failure of the rural detachment to examine the car properly once McGillivary had provided the number. If that is the case, we can only say that we feel that such conflict cannot be tolerated. If it is not the case, then the fault would appear to fall on the rural detachment for failing to follow through with its own investigation. It was negligent for the rural detachment not to have inspected the car carefully after it was identified so clearly within a month of the murder.

It would be easy to conclude that the middle-class status of the Colgan family was a contributing factor to the RCMP's casual approach to checking their vehicle. Less "respectable" citizens surely could not expect such deferential treatment.

Some responsibility for the failure to follow up on the lead provided by McGillivary must also rest with the higher levels of the RCMP in their failure to supervise properly the somewhat inexperienced detachment at The Pas. We heard testimony that the RCMP Crime Index Section in Winnipeg was integrally involved in the attempts to identify the vehicle McGillivary had seen. But the Winnipeg officers did no better than their counterparts in The Pas in pursuing the lead properly. Failing to notice such an obvious omission in the investigation suggests to us that there must have been some serious flaws in the system of supervision. Divisional headquarters in Winnipeg should have provided better direction for the activities of The Pas detachment in this case.

In May 1972, after receiving the anonymous letter implicating Colgan, Houghton and Manger, the RCMP finally obtained a search warrant, seized the car and conducted a meticulous search. In the words of Urbanoski, "In effect, we forwarded the entire interior of the vehicle to the lab in Regina." A small piece of brassiere strap and some hair were found under the back seat. Analysis showed that the piece of brassiere strap came from the brassiere found beside the road near the murder site. Although the hair could not be identified positively as being Osborne's, it was found to be of a similar type. A small blood sample, which could not be identified positively, was found on the back seat. No fingerprints of significance were found.

Some of the RCMP witnesses suggested that the failure to examine the car immediately in December had no effect on the investigation. We do not agree. While it is speculation, it is possible that an early interview of Lee Colgan might have borne fruit, or that fingerprints or other evidence might have been found in the car. Had the order been given in November or December to search the car, more useful evidence might have been found. It is clear that Colgan did not clean the interior of the car thoroughly after the murder.

It is possible that Colgan's father did not know by November or December that his car had been used in a murder. If he had been asked then for permission to search the car, presumably he would have agreed, having no reason to refuse. Had he refused, then McGillivary's information would, in our view, have been sufficient to support an application for a search warrant.

Fingerprint or other evidence could have assisted the police greatly in bringing the case to trial. An early search of the car might have found a print from Betty Osborne. Don Knight, who was a member of The Pas rural detachment and was involved in the investigation at the time, said that due to the cold no fingerprints would have been left. It strikes

us, though, that the interior of the car might not have been cold. Under hypnosis, McGillivary said the windows were frosted. That suggests that the interior of the car was warm.

Insp. Michael Cassidy, who is in charge of RCMP Identification Services for British Columbia, appeared before us and contradicted other officers on the question of fingerprints. He said that fingerprints often can be obtained in cold weather. A hand that is warm in a glove, particularly a hand with oil or blood on it, may leave a very clear print. He also told us that the oil from a person's hair would be sufficient to form fingerprints. He did say, however, that the longer the time between the laying of a print and its examination, the less likelihood there is of obtaining a readable print. The chance is reduced after one month, further reduced after six months and again after two years. He did not, however, suggest, as other officers had, that prints could not have been obtained in this case. We accept Cassidy's evidence.

Overall, the evidence presented to us at our hearings suggested that the failure to examine the car in December may very well have had a negative effect on the course of the investigation. We suspect that valuable evidence was lost. Certainly, the piece of brassiere strap would have been discovered and the hair samples also would have been available earlier. The police would have known at an earlier date that the victim probably had been in the car and that at least Lee Colgan had been there, as well. While that evidence might not have warranted the laying of charges, it would have allowed the police to question Colgan at an earlier time and to confront him with strong evidence of his involvement. Had that occurred closer to the date of the murder, he might very well have agreed to talk to the RCMP and to testify. He was, after all, talking to others at that time about his presence at the scene. We believe, as did others, that Colgan was the weak link who might have cooperated with police had he been handled properly.

There was clearly a breakdown in the investigation and a serious mistake with respect to the examination of the vehicle. This was particularly unfortunate in view of the imaginative investigative work done in determining the identity of the vehicle. It is tragic that such good police work went for nought.

WE RECOMMEND THAT:

- Supervision by senior police officers be mandatory in the investigation of serious crimes.

Identification of the Suspects

The arrival of the anonymous letter at The Pas detachment on May 3, 1972 represented a major breakthrough in the case. It read:

> Sirs:
>
> The following information was related to persons in the fall of 1971 concerning the murdering of a young lady later found on a beach near La Pas Manitoba. The story was related by Lee Colgan being in a state of intoxication and near tears that he had been driving his car accompanied by Jim Houghton and Norman Manger. There were two or three mentioned but their names are forgotten. They had forced the girl into this car where it was then driven to the murder site, the girl being raped by all. She had threatened police action, she was then murdered using a screwdriver, punch, or similar instrument. Gordie Buck had seemingly witnessed the car returning from the beach in the early a.m. and Lee Colgan lives in constant fear of information possible being forwarded to the local authorities. It is hoped that investigation by the officers can produce results. The informants do not wish to identify as reprisals were threatened by Lee Colgan against the friends and families concerned. These men are all of the local area of La Pas Manitoba. (Exhibit 9)

The letter had been mailed in Marquette, Michigan on April 28, 1972. Attempts to locate its author were unsuccessful until after Colgan's arrest in 1986, when it was learned that it had been written by Catherine Dick, who had talked with Colgan shortly after the murder.

Despite the highly relevant and important information contained in the letter, its contents were not admissible in proceedings because the author was unknown. While it might have been used to obtain a search warrant or to arrest the suspects, it could not have been used by itself to support a charge of murder. More was needed.

In their first inquiries following the receipt of this letter, the police quickly established that the three men named in it were known to associate together, that they had been at the dance at the Legion on the morning of the murder, and that they had access to a white Chrysler with the licence number BN 5342. Attempts to link the three suspects with Osborne proved unsuccessful, although it was discovered that Osborne and Colgan had been in one class together at Margaret Barbour Collegiate some time earlier.

It was at this time, when going back through the records of the investigation, that the police realized that the Colgan car had not been checked properly earlier. The police were trying to be careful in order to preserve the element of surprise for later in the investigation. They checked the colours of the Colgan and Houghton cottages to see if they matched the paint found on the "Hanson" screwdriver. They did not. The RCMP also started to inquire around town to see if any rumour similar to that contained in the anonymous letter was circulating. They reasoned that if one person had been told, so might others.

On June 6, first Colgan and then Manger were interviewed. Both denied involvement and both declined to take a polygraph test. Manger told police that he was passed out

in the washroom of a local hotel on the night of the murder. However, this alibi could not be verified. Houghton had left town shortly after the murder and his whereabouts were unknown to the RCMP. On June 15, Brian Johnson told the RCMP that he had seen Colgan, Houghton and Manger in the Colgan Chrysler on the night of the murder. He informed the police that they had been drinking and that he left their company around 1:00 to 2:00 a.m. The RCMP then spoke with Houghton's parents in an attempt to locate him.

By June 20, the RCMP were becoming convinced that they finally knew the identities of three of those involved in Betty Osborne's murder. They then obtained a search warrant for the Colgan car and seized it. The discovery of the brassiere clasp, the hair and the blood stain confirmed their suspicion that Osborne had been in the car. On June 23, an informant finally gave the police the name of the fourth person: Dwayne Johnston. Johnston had been interviewed in December 1971 because his name appeared on the list of persons who had purchased beer the evening before the murder, and because he was on the list of persons receiving welfare assistance at the time. He had told the police to speak to his lawyer, D'Arcy Bancroft. This had not raised police suspicion because they felt that, since Johnston was known to belong to the local motorcycle club, it was a typical response from him. In addition, he was known to be a friend of Bancroft's. Johnston was next interviewed on June 23, 1972. His response, Urbanoski told us, was to "play dumb."

On June 29 an informant told police the version of the murder which came out at the trial of Houghton and Johnston. The Houghton and Colgan cottages were checked again, this time using police dogs. On July 11 the cottages were searched under a search warrant, and some paint and assorted clothing were seized. No links to the murder or to Osborne were found.

At the time the cottages were being searched, the police spoke with Bud Colgan, seeking permission to interview his son Lee. He refused and also denied knowing where his car had been on the evening of the murder. Although by this time they were certain they were on the right track, the police still had no admissible link between the murder and the four suspects.

In August, Houghton returned to The Pas from British Columbia, where he had been looking for work. He too denied any knowledge or involvement and also declined to take a polygraph test. By this time D'Arcy Bancroft was acting for all four suspects and he made certain that none of them would speak to the police. He wrote letters demanding the RCMP cease "harassing" his clients. The four suspects had erected a wall of silence between themselves and the police. The investigation was at a standstill.

Why Were the Suspects Not Arrested?

By July 1972, the RCMP were convinced they knew who had killed Betty Osborne and had several pieces of evidence to support this belief. They had the evidence of Philip McGillivary which, with the identification of the licence number, clearly put the Colgan car near the scene at a time that coincided with the time of death. Lee Colgan was known to make regular use of this car. Blood stains and hair samples had

been discovered in the Colgan car as well as a piece of brassiere strap which proved to be part of a brassiere found near the scene. As well, the RCMP had received Catherine Dick's anonymous letter stating that Colgan, Houghton and Manger were three of the men involved. Informants had indicated that the fourth was Johnston.

In our opinion these facts should have given the police reasonable and probable grounds to arrest any or all of the suspects and to take them to the detachment for questioning. The arrest and questioning might have resulted in comments or statements providing sufficient evidence on which to base a charge.

It is quite probable, in our view, that an early arrest would have prompted Colgan to provide information. We know that the police questioned Colgan later in a car and were making some progress until a couple of his friends interrupted the interrogation. If he was willing to talk at that time, when he already had a lawyer, he might have been as willing to talk earlier, had he been arrested and given an opportunity to talk to the police in a setting where he would not have been seen by his friends or interrupted. The fact that Colgan spoke to several people shortly after the the murder leads us to conclude that Colgan was not adverse to discussing the matter. The fact that the police believed they had sufficient grounds for obtaining a search warrant adds to our belief that they also had similar grounds to arrest and question Colgan, if not all the suspects.

As stated in *Eccles v. Bourque* (1974), 19 C.C.C. (2d) 129 (S.C.C.), the question of reasonable and probable grounds depends upon a bona fide reasonable belief in a state of facts that, if true, would justify the course pursued. The belief does not become unreasonable merely because the supposed fact has no real existence.

We presume that the police refrained from arresting any of the suspects because they did not believe they had sufficient evidence on which to base a charge, and we agree they did not. On the other hand, police may arrest if they have reasonable and probable grounds to suspect the involvement of an individual in an offence. Arresting someone and taking him or her in for questioning is a well-established police practice. It is a valid investigative technique and we do not know why it was not employed in this case.

Attendance at a detachment often will impress upon a suspect the seriousness of the situation and may cause a suspect to reassess a decision to remain silent. If the involvement of Colgan and Manger was minimal, as they later claimed, they might have seen the good sense in telling the police what really happened.

If the suspects refused to speak, they would have had to have been released within 24 hours. If they had called their lawyer, they might have been advised to say nothing. On the other hand, they might have said something of value to the investigation. One thing is clear. If the police had arrested and sought to question the suspects formally, nothing would have been lost and the subsequent investigation would not have been hampered in any way.

The police applied every other technique and ruse they could think of to get the suspects to talk to them. We do not understand why they did not apply this, the most standard of procedures. They took Aboriginal people to their office for questioning. Why did they not do the same thing to the suspects? We do not know the answer, although in

the cases of Houghton and Colgan police reluctance may have been prompted by the suspects' middle-class status. We simply say that they should have arrested and formally questioned the four suspects.

The Blitz

In September 1972, the RCMP sent four officers to The Pas in an attempt to obtain a breakthrough in the investigation. Cpl. Keith Duncan, Cpl. Charles Koppang and Const. Hank Moorlag (who was an Inspector by the time of the Inquiry hearings) came from the Thompson detachment. Cpl. Denys Stewart (who was a Staff Sergeant at the time he appeared before us) came from Dauphin.

On September 21 and 22, Duncan and Moorlag, in an attempt to gain Manger's confidence, spent time drinking and talking with him under the guise of being off-duty police officers looking for good hunting spots. Then on September 23, those officers took Manger out to a lonely spot in the bush past the Clearwater Lake pump house to interview him. They pointed out to him that his alibi was not believable and asked him to tell them what really had happened. Even though, as he told us, Manger feared that the two officers were going to beat him, he did not admit to any knowledge of the murder beyond being in the car. Moorlag convinced Manger to take a polygraph test and obtained a written consent from him. They then drove back to town and Manger agreed to be available two days later when a polygraph expert would arrive from Regina. In the meantime these officers and other members of the RCMP team endeavoured to keep an eye on Manger as they continued with their investigation. Upon the arrival of the polygraph operator in The Pas, RCMP officers went to get Manger, who was in a hotel bar with members of a local motorcycle club. Before the police could speak to him, Manger eluded them by slipping out the back door with a friend of Johnston's. He immediately spoke to Bancroft, who advised him not to take the polygraph. On September 26, Bancroft wrote to the RCMP on Manger's behalf, withdrawing the consent to the polygraph and telling them to stop harassing Manger. Manger later said he initially gave his consent because he was afraid of what the police officers would do to him if he refused.

If the RCMP officers thought they had Manger's consent to a polygraph examination, they should, in our opinion, have done all that was reasonably possible to have it administered as quickly as they could. After months of being unable to obtain any real evidence, and with the investigation stagnating, Manger's willingness should have been considered a real breakthrough. Although Manger showed some reluctance to speak about what had happened when Osborne was picked up, he apparently was willing to discuss other events of the evening. Even if he were to have given only the names of the driver and the other occupants of the car, that would have laid the foundation for more pointed questioning of other suspects. Had he told police about the activities of any of the suspects, that information might have provided the basis for criminal charges or an arrest.

It is our experience that a person undergoing a polygraph test often is persuaded to repeat the information disclosed during the examination to other investigation officers, so that even if the results of the polygraph are not admissible in evidence, the

subsequent statement may be. A witness finally might have been available to permit the investigation to enter a new and more successful stage.

On September 24 the RCMP arrested Colgan on an outstanding *Wildlife Act* warrant. While a friend was paying the fine, Duncan took Colgan outside the detachment into a police car to speak with him. According to the officer, Colgan seemed ready to discuss some aspects of the events of the night of the murder. In his testimony before us, Duncan recalled the conversation:

> I mentioned his car—his dad's car being seized and searched. And my comments to him at the time were he knew what had been found in it and his comment was, "Oh, yes, the brassiere and the blood." And his comment was, "Well, that doesn't prove anything." He went on to say that he'd been all mixed up lately and that he would have to think about it. I again mentioned the others involved and I wanted him to tell me for my own satisfaction that he had not been involved. His reply was that he did not do it but he was along, he was scared that he would go to jail for 20 years. (p. 1764)

Their conversation was cut short by the intervention of a couple of Colgan's friends who came to the car.

Also on September 24, Stewart and Moorlag attempted to interview Johnston at the house in which he was living at the time. He refused to be interviewed and told the police to leave. Johnston does not appear to have been interviewed from that date until his arrest in 1986. He has made no statements to the police and refused to testify before us.

The following day Stewart and Koppang made the first of two attempts to interview Houghton. Houghton had declined to be interviewed without Bancroft present.

Houghton acknowledged before us that Bancroft had been hired by his father before he had returned from British Columbia. He did not remember signing a letter in September 1972 requesting the RCMP to cease harassing him, but admitted that he must have done so. The letter read:

> As members of the Royal Canadian Mounted Police have persistently questioned me concerning a death which they allege took place at Clearwater Lake last November, and as they have searched my premises, this is to confirm that I have retained D'Arcy Bancroft to act for me concerning the above.
>
> Further, on the advice of the said D'Arcy Kenneth Bancroft, I am not willing to answer any questions put to me or in any way to communicate with members of the Royal Canadian Mounted Police or anyone other than my lawyer. Anyone wishing to ask me questions should put the questions in writing to the said D'Arcy Kenneth Bancroft who will provide answers to any questions I feel should be answered after having legal advice concerning the questions.
>
> [Signed] Jim Houghton,
>
> Sept. 26/72 (Exhibit 16)

It is clear, however, that the RCMP were not as persistent with Houghton as they were with Manger or Colgan. And it would appear they did not attempt to interview Houghton again until after Colgan had agreed to testify in March 1987.

On September 26, after speaking with Houghton for the second time, Stewart and Koppang interviewed Colgan's father at the government liquor store of which he was the manager. Bud Colgan told them that although Lee had been there, he, in Stewart's words, "had not laid a hand on the girl."

The officers also spoke to a number of other persons during their week in The Pas. They spoke to Arthur Fishman, who owned the store where Colgan worked, as well as to Dennis Brownlee, a co-worker there. No information of any value was obtained from these interviews. Having decided that nothing further could be achieved, the four officers returned to their own detachments on September 27.

On October 1 Moorlag and Koppang attempted to locate Colgan near Pukatawagan where he was believed to be working on the railroad. On October 4 they attempted once more to locate Manger. Moorlag, this time alone, was in The Pas from October 17 to 19, apparently working on the Osborne file. On October 29 Stewart and Moorlag were back in The Pas to interview Colgan's father again.

The Second Phase of the Investigation

The intensity of the investigation diminished in its second phase as every avenue of further inquiry seemed closed to the police. Although the file remained open, it appears that little work was done after the end of October 1972.

Through the years the RCMP made some efforts to keep up the pressure on the suspects, particularly on Colgan and Manger. They interviewed Colgan and Manger on a number of occasions. They put most pressure on Colgan because they thought him the "weak link."

In December 1974, D'Arcy Bancroft died while visiting California. When Moorlag learned of his death, he went to British Columbia to interview Colgan once more. Colgan was very hung over after having celebrated the birth of his first child the previous evening and became hysterical when questioned about the case. Later, Moorlag attempted to interview Manger in Winnipeg, but found him passed out. Still later, another officer did interview Manger, who refused to discuss Osborne's murder.

A promising source of evidence was ignored through the lapse of an unidentified officer in 1976. While filing a complaint for assault against her husband, Arlene Colgan informed the RCMP that Lee Colgan had told her he had been involved in the murder. It may have been that the information was not new to the police but even so, a follow-up of Arlene Colgan's complaint could have provided another opportunity for the police to question Colgan. The opportunity, however, was missed.

Also in 1976, after Colgan had returned to The Pas, he was arrested by Const. Archie MacPherson on a warrant of committal for non-payment of a *Liquor Control Act* fine. When he asked what he was being arrested for, MacPherson told him that it was for first degree murder. Colgan's response was described by MacPherson:

> [H]e said, "It's impossible." He kept reiterating the fact that it was impossible, that he was the weak link in the four, and as long as he stayed quiet, the other three would not say anything. (p. 2393)

MacPherson said that Colgan left The Pas again shortly after this encounter. Colgan told us that the police from time to time would send him Screwdriver drinks in the bars of The Pas. Sheriff Gerald Wilson told us of that happening on one occasion when he was drinking with Colgan in 1977 or 1978.

In February 1977, the local Crown attorney reviewed the file and decided there was insufficient evidence to lay charges. In March and then again in May 1977, the file was reviewed by the RCMP. It was noted by the reviewing officer that there were no new developments and that no new avenues of investigation had opened.

In April 1979, the file was transferred to Thompson when the Dauphin subdivision was split in two and The Pas was placed under the new subdivision at Thompson. The file was reviewed there again and it was decided to send it to Criminal Information Services Manitoba in Winnipeg for a complete review and analysis. The file by this time occupied four full drawers of a filing cabinet. The review took a year to complete.

In 1981, the review was completed and the file was returned to Thompson. The review recommended the resubmission of the physical evidence to see if more modern techniques could reveal additional information. It also advised consideration of "certain charges" against Colgan and his father. However, no charges were laid as a result of the review.

We were told that two constables worked on the file between 1981 and 1983, but apart from the special interest Moorlag took in the file, it appears that almost nothing was accomplished during the second phase of the investigation.

The Third Phase of the Investigation

Urbanoski began his involvement with the investigation in 1983 by conducting a complete review of the file. He read it four or five times and checked the physical evidence to make sure it had been kept safe. He located all four suspects and interviewed all the officers who had worked on the file in the past. This review took from July 1983 through March 1984. He then followed up on the recommendations of Criminal Information Services Manitoba, by resubmitting the evidence. As it turned out, no new information was revealed.

Urbanoski also interviewed the two informants who had assisted the police in the summer of 1972. The memory of the first had all but failed by the time he was interviewed. Even under hypnosis he was unable to offer anything useful. The second refused to become involved in the investigation, claiming that he remembered nothing of what he had told the police in 1972. By this time it was October 1984.

In December 1984, Urbanoski submitted a plan to headquarters that called for him to work full time on the case. Since he knew that the four suspects and their friends still talked about the crime, his plan included the use of wiretaps to obtain information

which might be useful in bringing the four to justice. The wiretaps were carried out in Manitoba, Alberta and British Columbia, and required 11 full-time investigators as well as himself. The plan accounted for 7,000 staff hours during 1985. The first set of wiretaps was undertaken in May and led to the questioning of 38 persons.

In January 1985, Annette Veito told the RCMP that Colgan had talked to her about the murder. Following leads generated by this statement, the police interviewed four more persons but without results. In May 1985 Colgan's ex-wife was interviewed and related the admissions she had heard from Colgan during their marriage.

On June 12, 1985, Urbanoski placed an article in the *Opasquia Times*, the local weekly newspaper in The Pas.

The article read:

RCMP request assistance in murder

The RCMP are requesting the public's assistance in the investigation of a murder which occurred over 13 years ago.

On Saturday, November 13, 1971, the body of Helen Betty Osborne, 19, was found near Clearwater Lake. Osborne, a resident of The Pas and formerly of Norway House, had been attending school in The Pas at the time of her murder.

She was last seen alive at about 2:00 a.m. near the corner of Third St. and Edwards Ave. on the morning of her death. Police believe she had been lured into a vehicle and then taken to the Clearwater Lake area where she was brutally murdered.

A light-coloured automobile with Manitoba license plates was seen in the area where the body was located at the time the murder was believed to have been committed.

An RCMP spokesman said yesterday police have had a terrific response from the public on the case to date, but they are looking for more help from people in The Pas and the surrounding area.

"We're not looking for a big break in the case," he said, adding police would like to hear anything about the incident people may have seen or heard. "No matter how trivial it is, we'd like to hear it...sometimes we can use bits of information to tie things together."

The spokesman said people may have have been afraid to come forward with information at the time, or intimidated by peer pressure, or may even have thought their information too insignificant to mention. Police are even interested in learning the names of people who may know something about the incident.

Anyone with any information which might prove useful is asked to contact The Pas Rural RCMP detachment at 623–6441 or their local police office.

Anyone supplying information on this or any other matters will have their identity kept confidential.

Urbanoski admitted before us that he included in the article information that suggested that many persons had already come forward, a fact which was not true at the time. He did this to assure those with information that they would not be alone were they to go to the police. It was, he said, "To put their minds at ease." This resulted in four more persons' being interviewed.

As a result of the information gathered through these techniques, Urbanoski was able in December 1985 to seek permission to lay charges against Colgan and Johnston. Charges were authorized in August 1986. In an attempt to gather further information, Urbanoski submitted another plan, which included more wiretaps using 10 full-time investigators for six weeks and 4,000 staff hours. These investigators listened to phone conversations of the suspects in order to gauge their reactions to the arrest of first Colgan and then Johnston.

The second set of wiretaps began on September 30, 1986. Colgan was arrested on October 3. As a result of a national news media blitz at the time of Colgan's arrest, two more persons came forward with information. One of these was Catherine Dick, the author of the anonymous letter which had first given police the names of three of the suspects. She was living then in Saskatchewan. Johnston was arrested on October 27. On November 23, the wiretaps were terminated. As a result of this set of wiretaps, an additional four persons were interviewed.

At the time of Colgan's arrest, his lawyer, Donald MacIver, told the police that Colgan eventually would reveal to them his role in the murder. Just prior to the preliminary hearing, Colgan offered to give testimony in return for immunity from prosecution and that offer was accepted. As a result of his statement, it became possible to charge Houghton, who was arrested on March 15, 1987. With that the role of the police in the case began to give way to that of the Crown prosecutor's office.

One of the last acts of the police investigation occurred in May 1987. After the snow melted, the police once more searched the area around the Houghton cottage. They were following up a report from James Lamb, the second person to come forward after the arrest of Colgan and Johnston. He had told police that, while cleaning out the outhouse at the cottage in 1976, he had found a jacket which he then had dumped in the bush. The RCMP's search for what they hoped might be Osborne's missing jacket was unsuccessful.

The final involvement of the RCMP in the investigative aspects of the case occurred on November 10 and 11, 1987, when they located Manger and convinced him to testify at the trial of Houghton and Johnston.

This brought to an end an investigation marred by significant errors. While the RCMP put a good deal of dedicated effort into solving the case, those errors considerably delayed its resolution. Had it not been for the determination of Const. Robert Urbanoski, charges might never have been laid against anyone.

RCMP Dealings with Witnesses and Betty Osborne's Friends

The RCMP interviewed many persons during the course of the investigation, most of them more than once. Both Aboriginal and non-Aboriginal persons were questioned. As we have mentioned, there is a perception in The Pas and, as we comment elsewhere in our report, in Manitoba generally, that the police act differently toward Aboriginal people than they do toward non-Aboriginal persons. The evidence we heard relating to the investigation of Betty Osborne's murder supports that perception. Some of the testimony we heard shows that the Aboriginal people involved in this case were not treated with the same deference extended to non-Aboriginal informants.

Cornelius Bighetty was Osborne's boyfriend. A member of the Mathias Colomb Indian Band at Pukatawagan, he was 17 and attending school in The Pas at the time of her murder. He had seen Osborne during the evening before she was killed. Three days after Osborne had been identified, the police came to the house where he was living and took him and his room-mates to the RCMP detachment. He did not know at that time that Osborne was dead and thought something had happened to a member of his family in Pukatawagan.

The police did not tell either him or the family with whom he was boarding the purpose of his trip to the detachment. Nor did they seek the permission of the person with whom he was boarding, his parents in Pukatawagan, or anybody else before interviewing him. The RCMP claimed to have obtained consent from an Indian Affairs department counsellor but we do not believe that they did. This treatment is in marked contrast to their practice when interviewing Lee Colgan in June 1972 at the time he became a suspect. At that time the RCMP sought the permission of Colgan's father before attempting to conduct a formal interview, even though the younger Colgan was 18 and parental consent was not required by law.

After arriving at the detachment, Bighetty was taken into a small, dimly lit room in which there were four or more plainclothes officers. Without informing him of Osborne's death, one of the officers showed him a photograph of Osborne's badly battered face. Bighetty fainted. When he was revived, he was questioned for some 20 minutes to half an hour and then released. This heartless method of interrogation is not acceptable when dealing with a 17-year-old.

Later, Bighetty was pulled from a school volleyball game in which he was playing, and again taken to the detachment and questioned. No justification was offered by the RCMP for their failure to respect his rights. It is accepted that Bighetty might have been considered a suspect at first since he was known to have had a disagreement with Osborne the evening before her death. That being said, it must have become clear to the RCMP very quickly that Bighetty was not involved. They have offered us no evidence that they had any other reason to suspect Bighetty. It is our opinion that his treatment does not come up to acceptable standards of police conduct.

Others must also share the blame for the manner in which Aboriginal students like Cornelius Bighetty were treated. Indian Affairs officials did not fulfil their

responsibilities properly in protecting students' interests. They did not inform the parents of Betty Osborne's friends of the traumatizing effects of the murder or of the subsequent unauthorized police interrogations.

Another victim of police mistreatment was 18-year-old Annaliese Dumas. Born in Sandy Bay, Saskatchewan and raised in Pukatawagan, Dumas was another Aboriginal friend of Osborne's. She also was boarding in The Pas while attending school. The RCMP took her from the house at which she was boarding but they did not tell her why she was wanted at the detachment. She did not know at that point that Osborne had been murdered.

When they arrived at the station, another of the student friends of Osborne's told her that someone had been found dead. The two officers took her to the car and drove out to a secluded spot in the bush, where they started to ask her questions as to her whereabouts at the time of Osborne's death. When she became afraid and tongue-tied, Dumas was thrown upon the hood of the car. She started to cry and the two officers then apologized and took her home. During this interrogation Dumas did manage to tell the officers where and with whom she had been.

Later that evening two other officers returned and asked that she go to the morgue to look at Osborne's body. She did not recognize her friend. As she said to us, "Well, there was someone there but to me it wasn't Betty." The experience was so traumatic for this 18-year-old that she soon left school and eventually had to undergo counselling. She did not return to school for four years.

The police treatment of this young woman was brutal and insensitive. RCMP officers appear to have shown no understanding or sympathy. It does not even appear that they determined how close a relationship there was between Dumas and Betty Osborne. Showing her the mutilated body of her friend was not only insensitive and unacceptable, but also unnecessary. Surely the effect on a young woman of seeing a mutilated body must have been obvious to them. There is also no acceptable reason for taking her out into the country to conduct an interview, nor have the RCMP offered one. In fact, they deny that it happened. However, we accept the evidence of Annaliese Dumas.

It was clearly an established police practice to take suspects out of town for the purpose of questioning them. As Koppang said when speaking of another suspect, "If we want them to confess we've got to put a little stress on them." Duncan said it was common to interview people by taking them into the country. He said that was done to get people away from others who might see them being interviewed. He said they might be taken into the bush, "a private spot to talk to them." There was no policy of the force on the matter. Rather, it seemed left to the ingenuity of the investigating officer.

We recognize the difficult position in which police are placed as they attempt to solve crimes, but appropriate conduct is expected of them. The police must live by the rules that Parliament, the legislatures and the courts have laid down for them. The experiences of Dumas and Bighetty are painful reminders of what happens when they do not. If they have not done so already, the RCMP should review its rules respecting the proper and acceptable methods of conducting interviews to prevent officers in the future from breaching the proper bounds of conduct in the way they did with Bighetty, Dumas and Manger.

There is a striking contrast between the way the three non-Aboriginal suspects were dealt with and the manner in which the Aboriginal informants were treated. The parents of Houghton and Colgan were consulted before a formal interview was attempted. Their wishes that their sons not be interviewed were largely respected. Neither Colgan nor Houghton were taken into the bush to be questioned. But Manger and Dumas both were, and both are Aboriginal. Dumas, it should be noted, is also a woman. While we have no sympathy for Manger, it is clear that the RCMP acted improperly towards him and Dumas. This apparent difference in treatment suggests that the RCMP tailored their treatment in accordance with the race, sex or class of the person with whom they were dealing.

This contrast lends further credence to the belief that Aboriginal people were not treated with the same respect as non-Aboriginal persons. In view of the deference shown to the Colgan family, the conclusion is inescapable that the inappropriate treatment of Bighetty, Dumas and others occurred because they were Aboriginal and, therefore, in the eyes of these officers, less deserving of courtesy and respect.

We noted that Cornelius Bighetty, when he related his experiences to us, showed no animosity towards the police. In what can only be taken as complete generosity, he said that he had no complaint about the way he was treated by the police. He did say, however, that he would not allow the police to treat his own children the way he was treated by the RCMP in 1971.

This is a matter which causes us great concern. The enthusiasm and dedication of police officers in attempting to solve a terrible murder is commendable, but the police must never lose their perspective. In particular, they must not fail to recognize that they deal with many innocent people and that those people have sensitivities and rights. We can only repeat that we find the police conduct in relation to these Aboriginal informants to be completely unacceptable.

RCMP Contact with Justine Osborne

Betty Osborne was identified shortly after midnight on November 14, 1971. At 1:56 p.m. that day, the RCMP rural detachment in The Pas called the detachment in Norway House, Osborne's home community. Sgt. Alan Hayden-Luck, the officer in charge at Norway House, told Justine Osborne about her daughter's death. Hayden-Luck, who by that time had 19 years of service with the RCMP, had been in charge of the detachment since 1969. He had known Justine Osborne for about six months because she used to help Hayden-Luck's wife around the house occasionally. During that time, Hayden-Luck told us, Justine Osborne and his wife became "quite friendly," and he felt that he knew her "fairly well."

Hayden-Luck went to Justine Osborne's home and broke the news to her. He did not remember if there was anyone else there at the time but said that he thought there may have been. Osborne herself said that her 18-year-old son Isaiah was there. She told the officer that she would go to a friend's house. Hayden-Luck told her that they would bring her daughter's body to Norway House as soon as they could make the arrangements. Generally, it appears that the officer approached his difficult task with what he thought was care and sensitivity.

It was not RCMP practice to offer support or counselling in such situations. Hayden-Luck agreed, in retrospect, that it might have been better had he gone to her house accompanied by one of her friends or relatives who could have stayed with her and helped her through the first difficult hours.

Hayden-Luck visited Justine Osborne once more in an attempt to find out if the clothing found at the scene belonged to her daughter. He also visited the local stores but found nothing conclusive. This would appear to have been in July 1972, the same month in which Hayden-Luck was transferred from Norway House. While he was still in the community, Hayden-Luck kept Justine Osborne informed of the latest news of the investigation whenever he happened to meet her. He said this would have happened about six times. He did so, he told us, as a matter of common sense. He was not aware of any official policy to keep family members informed of the progress of any investigation.

While we do not wish to be overly critical of this officer's conduct, a better way to have approached the problem of breaking tragic news would have been for the officer to approach the chief of the band or someone else at the band office, tell him or her the news, and ask that someone familiar with the person accompany the officer. In this way the bereaved could be informed in her own language by someone she knew. Such a person would also know what kind of family or community support might be most appropriate.

Justine Osborne, when she appeared before us, was not critical of the manner in which the officer informed her of her daughter's death. This is not surprising since, as she herself made clear, she was in a state of shock after being told that her daughter had been murdered. When asked what Hayden-Luck had said after informing her of the murder, she told us, "I don't remember what. I didn't care. I didn't care what he said after."

Hayden-Luck spent only 10 minutes with Justine Osborne. Indeed, she didn't want him to remain. When asked if Hayden-Luck inquired if he could take her somewhere, Osborne replied:

> I didn't want him to take me anywhere ... I told him that I would go down to my ... neighbours who ... knew. That I would go myself. (p. 624)

We recognize that much progress has been made in the area of assistance and support for the victims of crime and their families. The lack of any support for Justine Osborne only highlights the need for such programs.

When she appeared before us Justine Osborne commented that it was 16 years before the police spoke to her again about her daughter's murder. That was at the time of the arrest and charging of Colgan, Houghton and Johnston.

We believe that it is appropriate for relatives of a murder victim to be kept informed of the progress, or lack of progress, of any ongoing investigation. Certainly, there was no reason for Justine Osborne not to have been kept informed. The distance between Norway House and The Pas would make it unlikely that news of the investigation would be available. That, it seems to us, would increase the need for the police to keep Osborne informed. At the very least, reports on this matter should have been forwarded to the chief and council from time to time.

CHAPTER 5

THE COMMUNITY

Community Knowledge of the Murder

One of the central issues concerning the investigation into the murder of Betty Osborne is when the identity of her assailants became public knowledge and when it became known to the police. It has been said that knowledge of the men's identity was widespread in The Pas. Some even have suggested that "everyone in town knew" and yet did not tell the police.

After examining the evidence, we have concluded that immediately following the murder a small number of people became aware of who was responsible. This knowledge, however, was not widespread. It appears to have been restricted to a circle of relatives and acquaintances of the four men, and did not extend to the RCMP. Rumours—many of them fanciful—may have spread quickly, but actual knowledge about who was involved seems to have been limited. There was no knowledge of the identity of Osborne's attackers in the Aboriginal community.

It is clear that Colgan began talking about his participation in the days immediately following the murder. He told his story to Catherine Dick as early as the weekend of the murder. Annette Veito, who testified at the preliminary hearing, told the police that she first formed a belief that Houghton and Johnston might have been involved within a week of the murder. It seems probable that the close friends and acquaintances of Colgan's, and perhaps those of Johnston's also, came to know some details very shortly after the murder.

It also seems likely that those who had learned the details would speak to others about what they had learned. We might assume, then, that some rumours might have started circulating within days of Osborne's murder. We do not believe, however, that the rumours quickly became general knowledge. We believe that the threats by the suspects and their close friends intimidated some of those who heard the stories and prevented the rumours from circulating widely. Dick conveyed the information anonymously because she had been threatened by a close friend of Colgan's. Veito kept quiet until 1984 because she had been warned to be careful and was afraid of Houghton and Johnston.

It was only after receiving the anonymous letter sent by Catherine Dick in May 1972 that the RCMP began to concentrate its investigation on Johnston, Houghton, Manger and Colgan. After the seizure of the Colgan car and the questioning of the suspects, it appears that stories about the murder began to circulate more widely. Knowledge of police activity in itself generated rumours and speculation until a significant number of people were aware of the identity of those involved. However, from what we have been able to determine, there was never a time before the arrest of Colgan and Johnston in 1986 when "everyone in town knew."

Sheriff Gerald Wilson said he first heard that Colgan, Houghton, Manger and Johnston were the four suspects from Corporal Duncan by November 20, 1971. Duncan denied this, telling us that he first arrived in The Pas to work on the Osborne case on November 26, 1971 and that when he arrived there were no suspects. He said he left The Pas on December 12 and did not resume work on the investigation until September 1972. He remembers neither interviewing nor even talking to Wilson in 1971. None of the RCMP documents which were submitted in evidence suggests that the four became suspects before the receipt of the anonymous letter in May 1972. It is our conclusion that Wilson is mistaken about Duncan's having told him the identity of the suspects in 1971. We do not believe that the RCMP had the names of the four until the spring of 1972, when the letter from Catherine Dick identified three of the four and an informant in the town named the fourth as Johnston. It is, of course, possible that Wilson heard a rumour about the men from a source other than the RCMP.

Following the summer of 1972, the rumours increased. A person who appeared before us, and who wished to remain anonymous, told us that she heard the rumours during the spring or summer of 1972. Arlene Demmings, Colgan's ex-wife, told us that she heard the rumour that Colgan had been involved in Osborne's murder either in the fall of 1972 or the winter of 1973.

It was not until 1977 or 1978 that Sheriff Gerald Wilson, who was acquainted with Colgan through activities at the Legion, heard Colgan's story directly from him. Kathy Phillips, a civilian employee of the RCMP, was told the story by Colgan in 1978 or 1979. Veito did not hear any of Colgan's confessions until December 1984. Until that time she had thought it was Colgan's brother who had been with Houghton and Johnston on the night of November 12.

When Urbanoski took charge of the investigation, he interviewed a large number of people. It seems that he obtained the majority of these names from the response to

the article in the *Opasquia Times* and from the wiretapping of the phones of the suspects. Some persons refused to be interviewed. Only eight gave information of value to the RCMP.

The Conduct of Arthur Fishman

In the examination of the nature and extent of public knowledge of Betty Osborne's attackers, the behaviour of one resident of The Pas deserves particular attention. Arthur Fishman was the owner of the clothing store where Lee Colgan worked at the time of the murder. Colgan testified that within six months of Betty Osborne's murder he had told Fishman of his involvement in the killing.

In 1988 Fishman became a key informant for Lisa Priest when she was researching her book on the Osborne case, *Conspiracy of Silence*.[1] Much of Priest's information on the level of public knowledge of the attackers' identity came from Fishman. She took this information and fashioned it into the main assumption of her book: that many people in The Pas knew who killed Betty Osborne and shielded the killers from justice. When she testified at our hearing Priest said that Fishman had told her that within a week of the murder Colgan had revealed to him that he, Johnston, Houghton and Manger had been involved in killing Osborne. Fishman, Priest said, had told her that Colgan discussed the murder several times. During her testimony before us, Priest was asked:

> Q Do I infer ... that Fishman told you that he had received a confession from Colgan of his involvement at least on more than one occasion?
>
> A Yes, he said he brought it up on several occasions.
>
> Q Did he tell you how often?
>
> A He said all the time he talked about it. It was always on his mind and he'd given snippets here and there.
>
> Q The next quotation [from *Conspiracy of Silence*] is, "'There wasn't a person in town who didn't know what was going on.'" Are those the words of Mr. Fishman again or someone else?
>
> A Fishman. (p. 2146)

Fishman himself told us that he had read Priest's book and had thought generally it was a fair treatment of what he had said, despite other inaccuracies contained in it. In the course of his evidence before us, however, Fishman became quite evasive as to what he in fact had known. It is fair to say that he intended in his direct examination to leave us with the impression that Colgan did not tell him anything of substance and did not tell him anything which connected Colgan directly to the abduction and murder of Betty Osborne. Fishman eventually did tell us that within a month or two of the murder Colgan

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1 Lisa Priest, *Conspiracy of Silence* (Toronto: McClelland & Stewart, 1989).

had made a number of comments about being with Johnston, Manger and Houghton when they took an Indian girl to Clearwater Lake. Fishman said that he assumed the girl Colgan was referring to was Betty Osborne and that the outcome of the trip was murder. When he testified before us, Fishman also repeated his views on how widespread public knowledge was:

> Q When did it become common knowledge that Lee Colgan, Norman Manger, Jim Houghton, and Dwayne Johnston murdered Betty Osborne?
>
> A By way of hearsay I would say two to three months after the actual incident occurred, but again it was hearsay. It was bandied about in town. It was on the tongues of everyone in town because of the horrible nature of this murder. It was the topic of conversation for a long time in The Pas.
>
> Q You're saying then by three months, by February, 1972, the names of the four killers were common knowledge in The Pas?
>
> A Well, the names of the four who were supposedly the instigators of this heinous crime was common knowledge in The Pas, but again it was hearsay evidence.
>
> Q By common knowledge, do you mean that it was coffee shop gossip?
>
> A I would suggest that it was more than coffee shop gossip. It was generally a topic of conversation and not just what you would consider coffee shop gossip. (p. 2023)

As we have already stated, we do not believe that public knowledge about the attackers was as prevalent as Fishman and Priest suggested. But it is apparent to us from the evidence of Colgan, Priest and Fishman himself that Fishman did know something of Colgan's involvement in the abduction and murder of Betty Osborne, and knew also about the involvement of the other three.

It also is clear to us that Fishman did not relate that information to the police at any time and that his first public disclosure of what he knew came in his interview with Lisa Priest. However, we believe that in that interview, Fishman probably embellished aspects of his story. He did so for his own purposes, not all of which are clear to us, but he related things to Priest that did not occur. As an example, Fishman apparently told her that Colgan first spoke to him about his involvement in the murder at the store in front of other store employees, including Dennis Brownlee, brother-in-law of RCMP officer Keith Duncan. Brownlee denied such a story, and Duncan stated that Brownlee has always maintained to him that Colgan had told him nothing. We accept Brownlee's evidence on this point. While that part of Fishman's story to Priest made for fascinating reading, it has proven to us to be untrue.

While we believe that Fishman embellished what he knew to Priest, we also believe that Colgan did disclose his involvement to Fishman and that Fishman failed to disclose any of that information to the RCMP. Fishman asserted that he failed to disclose what he knew to the police for any one of four reasons:

1. That Colgan would deny the conversations ever took place.

2. That the conversation with Colgan was private.

3. That the information related by Colgan was hearsay.

4. That the information related by Colgan was known already to the police.

It was apparent to us that Fishman did not believe any of these reasons. More importantly, none of those excuses justifies his failure to come forward. Perhaps the real reason he failed to disclose Colgan's involvement had to do with another fact.

Some time prior to November 12, 1971, Fishman discovered that Colgan had stolen over $900 from the store. Fishman confronted Colgan about the theft and arranged with Colgan to repay the store at the rate of $25 every two weeks until the full amount was paid. In the evidence of both Priest and Fishman himself, it became obvious to us that Fishman was persuaded into silence by the fact that without Colgan's continued employment with the store, he probably would not recover his money.

Lisa Priest was asked if she knew why Fishman did not go to the police with the information he had, and she stated:

Q Anything else, other than that, by way of explanation or response?

A Well, I asked him how he could have this guy working in his store after he heard this.

Q Yes?

A And he said it didn't really bother him that much.

Q Did he tell you that this guy was also indebted to him and working off a debt at the time?

A Yes, he wanted his money. (p. 2144)

In an exchange between Fishman and counsel for Justine Osborne, the following took place:

Q Isn't that the reason that you didn't get rid of Mr. Colgan in early January when you knew he was connected with the murder and you obviously knew he was connected with the theft; the reason you didn't get rid of him is you wanted your eight or nine hundred dollars back, you wanted him to work it out?

A He did work it out and our agreement was at the end of the time that the money was paid back his services were terminated.

Q Well, let's say he didn't owe that to you, would you have fired him once you linked him up with the murder?

A I certainly would have. (p. 2078)

Fishman obviously knew of Colgan's involvement in the murder within a very short time. His decision not to relate that information to the RCMP or even to terminate Colgan's employment with him discloses an individual with a warped sense of social responsibility.

He is one of the few individuals whom we have been able to identify who had early, direct knowledge from one of the four suspects about the murder. Whether that evidence would have been sufficient to charge or convict Colgan is difficult to say, given Fishman's evasiveness and deliberate vagueness before us. But we do believe that he was told something concrete by Colgan and should have reported what he heard to the police.

It is clear that Fishman was not motivated by fear for his own safety in failing to disclose whatever information he had, as there is no evidence whatsoever that he was under any threats or coercion to keep silent, as were some of the other witnesses.

Fishman probably was motivated by self-interest in not wanting to jeopardize Colgan's freedom so that Colgan could continue to work for him in order to pay off the money that he owed. This does not explain, however, why there was a failure to disclose the information to the RCMP following Colgan's termination of employment early in 1972. It is possible that his silence at that point was motivated by the race of Betty Osborne. However, we are prepared to accept that it is equally conceivable that he failed to disclose anything further to the RCMP after May 1972 because he did not want it known to anyone that he had had that information and had withheld it for mercenary reasons.

The fact that Fishman did not tell the RCMP what he knew helps us assess his statement that the identity of Osborne's killers was "common knowledge" within three months of the murder. If it became accepted as fact that "everyone knew," then he would more easily be able to justify not coming forward. This was true of others as well who might have known.

Our conclusion is that for Fishman, who had direct admissible evidence against Colgan, the contention that "everyone knew" was a convenient excuse for his silence. Whatever his motivations, Fishman's failure to disclose the information he had probably allowed Colgan to escape responsibility for his involvement in the events of November 12, 1971.

Communications with the Police

Although there would appear to have been only limited knowledge of the identity of the murderers in The Pas, it is clear that many people had heard rumours and yet did not convey their content to the police. The silence probably says something about the relationship between the police and the community. Either the police were not close enough to the community to hear the rumours, or the community members did not feel close enough to the police to discuss matters of this kind with them. It must be kept in mind, however, that many people did come forward years later when Urbanoski took control of the investigation.

We do not find it highly surprising that average citizens did not communicate the rumours to the police since, to our knowledge, this has not been the practice in our society. While there may be a moral obligation, there is certainly no legal requirement to

relate one's knowledge of criminal behaviour to the police. Crime Stoppers and similar programs now encourage the public to do so and are effective because even fragmentary information can be valuable in augmenting existing knowledge about a particular case. The program has made it easier for members of the public to assist. There was no Crime Stoppers program in place in The Pas in 1971.

Rewards have been used for many years to encourage people to convey important information to the police but, although this option was considered, a reward was not offered in the Osborne case. Although the RCMP asked the Attorney General's department to authorize one early in the case, the Deputy Attorney General declined. It is not clear why this decision was taken. Crown attorney George Dangerfield and others believed it might have helped.

There are different reasons why citizens of The Pas may have remained silent about knowledge they had about the murder of Betty Osborne. Some of these reasons are straightforward. It is clear that the silence of the four suspects was motivated by mutual protection and self-interest. Their friends and families also remained silent to protect them. The concern of these people obviously was much greater for the suspects than it was for the victim whom they did not know. Several acquaintances of the suspects', such as Catherine Dick, Annette Veito and both the unidentified witnesses, remained silent out of fear.

More complex are the motivations of other members of the community who did not tell the police what they knew or had heard. Our society generally shows an indifference to the victims of crime. Unless there is a direct personal connection to victims, it is all too easy for us to disregard their plight. It is easier and safer not to become involved. Sometimes this apathy assumes grotesque proportions. One well-known example of this was the 1964 murder of Kitty Genovese, a New York woman, whose cries for help while being fatally stabbed were ignored by her neighbours. Only after she had died did someone finally call the police. Indifference to the victims of crime takes the form of detachment and passivity; a kind of personal insulation from the unpleasant realities of the world around.

Coupled with this is the attitude that crime is a matter for the police. This attitude serves to release individuals from taking personal responsibility even in situations where they have knowledge which might further the cause of justice. Many people in our society feel estranged from the police, making it all the more likely they will attempt to remain uninvolved.

All these attitudes seem to have been at play in The Pas during the investigation of the murder of Betty Osborne. Indifference to the victim and a wish to remain uninvolved were probably more powerful motivating factors than was racism.

We saw these attitudes even in employees of the justice system who appeared before us. Kathy Phillips, who worked for the RCMP, told us she remained silent because she "wasn't a constable." Sheriff Gerald Wilson told us that his reason for not coming forward until 1986 was that he thought the police already had the information. He also thought that he had communicated with a plainclothes police officer in the Legion the night after Colgan made his confession to him. He said he spoke to the person who had sent Colgan the Screwdriver drink. Wilson testified he told the man, "'Colgan wants to

talk. If you keep the pressure up, he'll break,' or words to that effect." To this day we do not know whether or not the person to whom the sheriff spoke was a police officer.

Whatever his motivations, we find Sheriff Wilson's inaction to be inexcusable. Because of his special position within the justice system, we believe that Wilson had the responsibility to come forward and tell the police of his conversation with Colgan.

It appears that townspeople who, like Wilson, did not come forward just did not care about Osborne and her brutal death or thought they had nothing of value to offer. It does not seem possible to classify this silence as a "conspiracy." We conclude that some of the friends and acquaintances of the suspects' deliberately chose not to speak and there was a conspiracy among them, but apart from those, we were offered no evidence of any conscious decision on the part of the townspeople to suppress information about the murder.

The Role of Sexism

Women in our society live under a constant threat of violence. The death of Betty Osborne was a brutal expression of that violence. She fell victim to vicious stereotypes born of ignorance and aggression when she was picked up by four drunken men looking for sex. Her attackers seemed to be operating on the assumption that Aboriginal women were promiscuous and open to enticement through alcohol or violence. It is evident that the men who abducted Osborne believed that young Aboriginal women were objects with no human value beyond sexual gratification.

We know that cruising for sex was a common practice in The Pas in 1971. We know too that young Aboriginal women, often underage, were the usual objects of the practice. And we know that the RCMP did not feel that the practice necessitated any particular vigilance on its part.

It is intolerable that our society holds women, and Aboriginal women in particular, in a position of such low esteem. Violence against women has been thought for too long to be a private affair. Assaults on women have not been treated with the seriousness which they deserve. Betty Osborne was one of the victims of this despicable attitude towards women.

Chief Lathlin of The Pas Band suggested that the fact that Osborne was Aboriginal and a woman contributed to the delay in bringing the perpetrators to justice. Justine Osborne thought that if her daughter had been a white woman there would have been more interest.

Osborne's friend, Rebecca Ross, raised similar questions:

> I always wondered why it took this many years to bring the case up and I also was very disappointed in my own native people that they didn't do their part to push the case through, and I always wondered why did they not push the case.
>
> Was it because that Helen Betty Osborne was a woman? (p. 2311–12)

There is one fundamental fact: her murder was a racist and sexist act. Betty Osborne would be alive today had she not been an Aboriginal woman.

CHAPTER 6

THE DEFENCE LAWYERS

Principles of Representation

An examination of professional conduct in the Betty Osborne case provides some concrete examples of how a lawyer's conduct can affect the course of justice and, more importantly, the rights and lives of clients and, indeed, the public at large.

Our task has been to examine all matters surrounding the Osborne case and to report on all matters of importance to the administration of justice that arise from that case. There are no matters of greater importance to the legal profession than the ethics and conduct of its members. The same issues are of equal importance to the public which must repose its trust regularly in the integrity of lawyers. We are satisfied that it is within the purview of this Inquiry to examine the conduct of the lawyers who played so prominent a part in the investigation and prosecution of those involved in the murder of Betty Osborne.

The conduct of lawyers is regulated by the Code of Professional Conduct of the Canadian Bar Association (the Code of Ethics), and by case law. The Code of Ethics states as its primary concern the protection of the public interest.

A client who retains a lawyer is entitled to receive the best services and the best advice that lawyer is capable of giving. If a lawyer is approached by someone who asks to be represented, the lawyer should agree to act only if he or she feels sufficiently familiar with the issues involved, and is free to devote the necessary effort to the case.

If for some reason the lawyer feels unable to provide proper attention and good, independent advice to each and every client, the lawyer should refuse to act.

Once a lawyer takes on a case the lawyer must examine the facts of the situation, analyse them, consult legal authorities if necessary, and tell the client the strengths and weaknesses of his or her situation. The course of action the client wishes to take should be determined then. It is for the lawyer to advise and for the client to decide what he or she wishes to do. The lawyer may suggest to the client what should be done and if the client disagrees, the lawyer has the right to terminate the relationship and to suggest that the client seek other counsel. It is not, however, for the lawyer to tell the client what to do.

A lawyer who takes cases for those charged with criminal offences must represent them without fear or favour. The lawyer often is not popular when acting for certain unsavoury individuals. However, in the broader sense, that lawyer is performing a valuable service to society as a whole. The lawyer becomes a watchdog of civil and legal rights. It is to the lawyer that people turn, whether guilty or innocent, when those rights need protecting.

The obligation of a lawyer, when taking on a criminal case, is delicate. A lawyer is obliged to provide the client with the best defence possible. When doing so, the lawyer is protecting the interests of society by ensuring that people are not convicted improperly, and that the protections accorded by general principles of law and justice and by the *Charter of Rights and Freedoms* are not overlooked. The lawyer should inform the client of the likelihood of being acquitted or convicted on the basis of the facts as the lawyer understands them. The lawyer should advise the client of any options which may be available. If, for example, there is a possibility of conviction for a lesser offence but acquittal for the main offence, the lawyer should advise the client of that possibility. If the lawyer thinks it possible that the prosecutor might permit the client to plead guilty to the lesser charge and so avoid going to trial on the more serious one, it is the responsibility of the lawyer to so advise the client.

At trial the lawyer is entitled to put forward any and all possible defences. The lawyer must cross-examine witnesses to test their truthfulness, their recollection and their accuracy. The lawyer should decide whether it is in the client's best interest for the client to give evidence or whether it is better to seek an acquittal on the basis that the Crown has not proved its case beyond a reasonable doubt.

The lawyer may not call a witness to state something the lawyer knows to be untrue. The lawyer cannot call an accused person as a witness and knowingly permit him or her to lie. If the client has admitted committing an offence to the lawyer, the lawyer may not allow the client to deny on the witness stand that he or she committed the offence. If such were to happen, a lawyer must withdraw from the case. The admission to the lawyer remains privileged, and must not be disclosed to anyone by the lawyer.

There is no prohibition preventing a lawyer from representing two or more clients accused of the same offence. However, doing so is fraught with danger and subject to some severe limitations. The Rule in Chapter V of the Code of Professional Conduct allows such representation with the consent of the clients given after the lawyer has made adequate disclosure to the clients. A lawyer cannot, however, represent multiple clients where "there is or is likely to be a continuing conflict" among the clients. Commentary 5 on the Rule provides in part:

> The lawyer should, however, guard against acting for more than one client where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise, or their interests, rights or obligations will diverge as the matter progresses.

This means that a lawyer can act for two or more clients only with the informed consent of those clients, and only if the lawyer is satisfied of his or her ability to represent appropriately the interests of each of them without compromising the duty to the other or others. If the involvement of each accused in the alleged criminal activity is similar, and if the procedure to be followed by each is the same, and if no interest or possible benefit to any of them are compromised, then the lawyer may act for two or more clients charged with the same offence.

The lawyer may not, under any circumstances, act where a contentious issue has arisen between the parties. Commentary 6 on the Rule states:

> If, after the clients involved have consented, an issue contentious between them or some of them arises, the lawyer, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of the Rule if the lawyer attempted to advise them on the contentious issue.

Where a contentious issue has arisen, the lawyer is required to refer the clients to other lawyers.

There is a further restriction on the role of a lawyer in a criminal case. It is absolutely improper for a lawyer to become a party to any criminal activity or to protect, by illegal means, anyone who has committed a criminal act. The lawyer is not to manufacture a defence. While a lawyer may advise his or her client to testify or to refrain from testifying, it is not appropriate for the lawyer to tell people what they should do or say to the police or as a witness in court. The lawyer cannot assume this authority by purporting to act for people he or she should not, or cannot, represent independently.

The Conduct of D'Arcy Bancroft

D'Arcy Bancroft was one of a very few lawyers practising criminal law in The Pas in 1971. After being called to the bar in 1969 he left Winnipeg to practise in The Pas. He saw himself as a specialist in civil and criminal litigation, and appears to have gained a reputation as effective counsel. His partner, Robert Mayer, who appeared before us in an attempt to shed some light on the role of Bancroft in the defence of Colgan, Houghton, Johnston and Manger, described him as a "good criminal lawyer" and an ethical one who would do nothing improper, but who could be at times "a little over-zealous." Bancroft, who passed away in 1974, was, in Mayer's words, "the consummate advocate."

D'Arcy Bancroft was an unusual man who, while expressing dislike of the police, nevertheless had a good relationship with them, as he did with the Crown prosecutors with whom he came into contact during the course of his work. We heard that Bancroft included policemen and judges among his friends. He is said also to have had a tendency

to "get too close to his clients," and to form friendships with clients, some of whom would on occasion stay with him. He was known to be a personal friend of Dwayne Johnston's.

In the course of the RCMP investigation of the Osborne murder, Bancroft acted for the four murder suspects and two potential witnesses. This had a considerable impact on the police investigation and on the conduct of the four suspects. The effect was so substantial and his actions so unusual that, although we hesitate to be critical of someone who is deceased and no longer able to defend himself, we feel we must take a close and careful look at the involvement of Bancroft. In examining his involvement we are aware that we do not know what the various parties told him. Robert Mayer told us that Bancroft's files were closed or given to other lawyers after his death and that, to the best of his knowledge, all Bancroft's records had been destroyed by 1984. We accept the caution of veteran Saskatchewan prosecutor Serge Kujawa, who appeared before us, that it is dangerous to arrive at any conclusions with respect to the conduct of Bancroft without that information. We have tried accordingly to assess the evidence on this point most carefully before coming to any conclusions. We have considered carefully the correspondence which Bancroft sent to the Crown attorney and the police on behalf of the suspects, as well as the direct evidence of Colgan and Manger.

At various times during the summer and fall of 1972, Bancroft stated that he was acting for all four suspects as well as two potential witnesses. When the RCMP first received the letter sent by Catherine Dick in May 1972, they started to make inquiries about the people to whom the letter referred. Apparently, on June 14, 1972 they interviewed Gordon Buck, who was mentioned in the letter as having seen the car returning from the murder scene. The following day Cpl. John Fitzmaurice received a message to call Bancroft. When he did so Bancroft told him that he was representing Buck and that any questions the RCMP might wish to ask should be directed to Bancroft. It was established quickly that Buck had not been involved.

When the RCMP approached Lee Colgan, he spoke to his father and the two went to see Bancroft. According to Colgan, Bancroft told them that he already knew the story, that he did not need to hear anything further, and he told them to go home and not to speak with the police. On July 12, Bancroft wrote to the RCMP that he acted for Colgan and that Colgan was not to be questioned unless he, Bancroft, was present. On July 14, he wrote to the local Crown attorney stating that he acted for Bud and Lee Colgan, and had been asked by Frank Houghton to represent his son and Dale McDougall, whom he described as "a young lad who lives with the Houghtons and who is like a son to them." McDougall had been mentioned in the rumours reported to the RCMP by an informant. The rumours suggested that Houghton's blood-soaked clothing had been placed in a suitcase belonging to McDougall and later disposed of.

On September 26, 1972 Bancroft again wrote the RCMP. This time he said he was acting for Lee Colgan, James Houghton, Dwayne Johnston and Norman Manger concerning the "Investigation of death of Betty Osborne." Attached to this letter were documents confirming that Bancroft acted for them and that they were unwilling to answer any questions without the questions' first being submitted to the lawyer in writing. The documents also said that Bancroft had been instructed to take all

necessary steps to prevent them from being harassed by the police. In addition, he forwarded a letter signed by Manger withdrawing his consent to a polygraph test.

On the same day Bancroft sent another letter to the local Crown attorney along with copies of the documents sent to the RCMP. The letter suggested that the police were guilty of breaking laws relating to conspiracy, watching and besetting, intimidation and misuse of licence plates, and demanded that they stop. He asked that those responsible for the violations be punished. The last letter also enclosed statements of the various suspects and also of Bud Colgan, Bonnie Colquhoun, Johnston's landlady at the time, and Bancroft himself. These complained of various police actions. Johnston's statement also confirmed that Bancroft had been acting for him since early July.

There is no question but that the police would have had more chance of success in obtaining information from the suspects if Bancroft had not been so active on their behalf. We know that the local Crown attorney was concerned by Bancroft's intervention because he advised the police to back off somewhat. The RCMP themselves said that the letter had quite the opposite effect. Moorlag told us that the officers involved in the investigation discussed Bancroft's letter and its demand they have no further direct contact with the four suspects. Of their response, he commented, "Well, we were determined to have further contact with them." Nevertheless, Bancroft's actions on behalf of his clients clearly were effective. The four suspects managed to avoid answering for Osborne's murder for so long because they were well advised by Bancroft as to their rights under the law. The difficult question is whether he was merely protecting his clients' interests, or whether he had sacrificed the interests of some of his clients to benefit others.

The RCMP officers, who were attempting to get one or more of the suspects to talk to them, clearly felt that D'Arcy Bancroft acted improperly in representing all four suspects and two potential witnesses as well. The problem we have in commenting upon the conduct of Bancroft is that we do not know what any of the suspects told him. Bancroft should, of course, have interviewed each client separately to hear his story and to obtain all possible information about his involvement. Had he done this he surely would have realized he had a different responsibility to each of them. If Bancroft had been told the truth about the involvement of each in events leading up to the murder, he would have been correct in assuming that each of them might be convicted of some offence. Indeed, the state of the law at the time was such that someone who drove a car in which murderers rode to and from the scene, and anyone who offered encouragement of acts that led to murder, might also be convicted of murder.

The "constructive murder" rule as it existed in 1971 resulted from the combined effects of s. 21(2) and s. 213. In *R. v. Trineer*, [1970] 3 C.C.C. 289 (S.C.C.), the court said that where one of a group of accomplices commits murder during the course of another offence, all the accomplices will be guilty of murder if it can be proved that each ought to have known that bodily harm would be inflicted on the victim in order to facilitate the commission of an offence.

This rule has been altered considerably under the Canadian *Charter of Rights and Freedoms* and *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. It is now required that intent to murder be proven in relation to each accomplice.

Even if only one person had committed the murder, the others might be convicted of some lesser, yet serious, charges. If, however, it could be shown that all four were aware that an assault would be made upon Osborne and, given that Johnston is alleged to have pulled her into the car, it would appear that that could be shown, then all four suspects might be liable to a conviction for murder. In either case, Bancroft would have been justified in telling them that they did not have to incriminate themselves by making a statement to the police.

This role of defence counsel is not always understood by the public. What may at times appear to be the protection of criminals by lawyers may only incidentally be that. A lawyer is cloaked with certain privileges which he or she must exercise on behalf of clients. In some societies people are presumed to be guilty when they are arrested and accused by the state. In such places those people must prove their innocence. In other societies an accused person is obliged to make a statement dealing with an involvement in or knowledge of a crime.

In the Anglo-Canadian justice system, there are certain rights and principles that apply to a person suspected of having committed an offence. Others apply once a person has been charged. One principle is that a person is presumed to be innocent and remains innocent unless or until the state (the prosecution) establishes guilt beyond a reasonable doubt. Another basic principle of our system of justice is that a person cannot be called upon to supply the evidence for his or her own conviction. From that springs the principle that a person does not have to give a statement to the police. Statements are not received by a court unless freely and voluntarily given.

Bancroft would have told those who approached him in this case that they had those rights. He clearly went the next step as well and advised all of them to stand on their right to refuse to say anything to the police.

It is not surprising that the police and others concerned about finding the murderers might not be pleased when confronted by suspects relying on their rights, nor would they be pleased with a lawyer who was giving that advice. Some may have had the impression that the lawyer was obstructing the course of justice. Because we do not know what the suspects said to Bancroft when they went to see him, we cannot be critical of his advice to them not to talk to the police.

We received differing opinions about Bancroft's conduct from two experts who testified before us. Graeme Garson, a former chief executive officer of the Law Society of Manitoba, felt that Bancroft had breached his ethical responsibilities in representing the four suspects. Serge Kujawa, a senior Crown attorney in Saskatchewan, was more guarded and noted that he would have to know more of what Bancroft had been told before he would judge his conduct. He did agree that Bancroft may have breached his duty as a lawyer but noted that there is no rule which states that a lawyer must not act for two persons charged with the same offence, and commented, "[T]here is nothing on the face of it that says that he necessarily acted improperly." We share this latter view.

If, on the other hand, Bancroft had known that one or more of his clients had been involved directly in the killing and the others had not been, our conclusion would be quite different. In those circumstances Bancroft could not have given the appropriate

advice to one without jeopardizing the position of another. He would have had to decline to act for any of them and told each to engage a separate lawyer. The Code of Professional Conduct is quite clear in prohibiting any lawyer from acting for multiple clients, whether charged or not, once their interests have diverged.

Lee Colgan's father seems to have had some concerns in this regard. When he talked with Corporal Stewart and Constable Moorlag on October 29, 1972, he said he intended to seek independent legal advice because he felt that a conflict of interest existed and that Bancroft was not representing his son's best interests. There is no indication that Bud Colgan actually sought an independent lawyer, but it is clear he was not completely comfortable with the arrangement with Bancroft.

There are two areas in which Bancroft clearly was wrong. He should not have written to the Crown attorney personally attesting to the good character and innocence of his clients. In his letter of July 14, 1972 to the Crown attorney he said:

> The writer can assure you that he is personally satisfied that the boys had nothing to do with it.... Further, the writer knows Lee Colgan and the Colgan family very well and, in the writer's opinion, there is no possibility that Lee Colgan could be involved in such an event. (Exhibit 16)

He suggested that the investigation had turned into persecution.

A lawyer may defend, submit arguments or positions, but should not set aside his or her professional independence. A lawyer personally or emotionally involved in a case should decline to act and should send the clients to another lawyer. It might be that Bancroft believed in the innocence of his clients. Even so, Bancroft should have separated his personal beliefs as a friend from his professional role as an advocate. He should not have sent such a letter.

The second area in which Bancroft did not give independent advice was in his dealings with Bud and Lee Colgan. He should not have sent them away, saying that he knew the story. He had an obligation to listen to what they had to say and assess the situation from Lee Colgan's standpoint alone. The fact he did not act in this way was a serious breach of professional ethics.

The Conduct of John Scurfield

John Scurfield, the president of the Law Society of Manitoba at the time he appeared before us, acted as counsel for James Houghton at his preliminary hearing and trial. Colgan testified before us that, after the preliminary, he had been asked by Jack Halliday, a friend of Houghton's, to go to Winnipeg to speak to Scurfield, although in his testimony to us Halliday denied this. Scurfield told us that Colgan asked for the meeting. In any event a meeting took place between Colgan and Scurfield in the latter's office on September 23, 1987. Melanie Lautt, an associate of Scurfield's, also was present.

Colgan said that his impression had been that Scurfield wanted him to make his testimony less harmful to Houghton than it had been at the preliminary hearing. Scurfield denied making any such suggestion and said he merely agreed to listen to Colgan,

who had asked for the meeting. He said that Colgan told him that he would like to change his story because he had been told that it was hurting Houghton, but that he was afraid that if he did so he might lose his immunity from prosecution. Scurfield said that he told Colgan that if he were to change his story so that it more accurately reflected the truth, there would be no danger of losing his immunity. Scurfield said he ended the meeting by suggesting that Colgan speak with a lawyer. Scurfield paid Halliday for the expenses of his and Colgan's trip to Winnipeg as he had been instructed to do by his client Houghton.

Colgan and Halliday spent the night in a Winnipeg hotel. During that evening Colgan wrote a note to Scurfield stating that he would change his testimony. That letter read:

Sept 23/87

> To the best of my recollection in the matter concerning the death of Helen Betty Osborne, I'm not sure who drove the car from Jim Houghton's cabin to the pump house at Clearwater Lake. I'd also like to state that Jim Houghton remained in the car until after Dwayne Johnston got the skrewdriver [sic] and left the car. Thinking about what Dwayne might be doing, I soon asked Jim Houghton to see what was happening and if he could stop him.
>
> [signed]
>
> L.S. Colgan (Exhibit 48)

Colgan delivered the letter to Scurfield's office the next morning before returning to The Pas with Halliday. Colgan said he decided in the end not to change his testimony. He told the RCMP of the meeting on November 11, 1987, less than two weeks before the trial was to commence.

Crown attorney George Dangerfield told us that, during the trial of Houghton and Johnston, he spoke to Scurfield about the note and about the meeting. He believed that Scurfield was going to use the note in his cross-examination of Colgan in order to discredit Colgan's testimony and thus increase the likelihood of Houghton's being acquitted. Dangerfield told us that he was annoyed when he thought that was Scurfield's intention. This fact, combined with the pressure of conducting the trial, made him, as he put it, "a little raw." He informed Scurfield that if he used the statement, he would re-examine Colgan and bring out the fact that Scurfield had talked to Colgan and how he came to make the statement. Dangerfield's intention in re-examining Colgan in this way would be to discredit any change in Colgan's testimony.

Scurfield told us that he decided immediately after receiving the note that he would not use it during the trial. He remembered the meeting with Dangerfield differently. He believed that it was he who raised the matter. He said he thought that the letter would have been useless because the contents were unbelievable and because Colgan was so obviously an unreliable witness. He had sought and obtained Houghton's permission not to use the letter.

Neither Scurfield nor Melanie Lautt kept any record of what Scurfield acknowledged to be a very sensitive meeting. Scurfield told us that he was "extremely concerned about the meeting" and that he took "elaborate precautions" to ensure that the meeting could not be misconstrued. "Ethics," he told us, "have always been a very high consideration and I was very concerned that my integrity not be impugned by Mr. Colgan." Nevertheless, questions about the propriety of the meeting were raised at our hearings.

Despite his concerns, we conclude that Scurfield did nothing which compromised legal ethics when he agreed to interview Colgan or during the course of that interview. There is no ownership in a witness. This means that just because one party decides to call a witness, the other side is not precluded from talking to that person or calling him or her as a witness. Scurfield had every right to interview Colgan.

Indeed, once Colgan had indicated that he wanted to speak to him, Scurfield, in our opinion, had an obligation to speak to Colgan to hear what he wanted to say. Scurfield could have been accused of negligence had he declined to speak to Colgan and it later transpired that Colgan had some new or vital information of benefit to Houghton. Counsel has an obligation to pursue all possible avenues of defence including, if necessary, speaking to a person who has been called as a witness by the Crown.

One of the dangers of such an interview is that the witness and the lawyer may have different perceptions of the discussion. That happened in this case. Scurfield obviously was mindful of the delicacy of the situation, since he had an associate sit in on the interview. Even that was not enough to avoid the questions about its propriety which were asked at our hearings. We conclude, therefore, that it would be helpful if the Canadian Bar Association were to give guidance to counsel on how to deal with any future, similar incidents.

WE RECOMMEND THAT:

- The Canadian Bar Association and the Law Society of Manitoba re-examine their rules of conduct and implement guidelines which will protect the lawyer and at the same time give the public confidence that interviews with key witnesses are conducted properly.

  These guidelines might suggest that lawyers take the following steps:

  - Seek the permission of the witness to tape-record the conversation, and if permission is granted, tape the whole of the conversation including all preliminary remarks.
  - If the witness is unwilling to permit the meeting to be taped, have another lawyer or secretary present and instruct that person to make notes of everything said or done at the meeting, whether the witness presents new information or not.

- If the lawyer conducting the interview obtains useful information from the witness, he or she should take a statement in writing from the witness, have the witness read it over and then sign it, and provide the witness with a copy of the statement.
- If the lawyer is not able to get a written statement from the witness, he or she and the second lawyer or secretary should each prepare a memorandum of what took place at the interview and forward a copy of the memorandum to the witness following the meeting.

CHAPTER 7

THE CROWN LAWYERS

Background

The Public Prosecutions Branch is responsible for laying and approving charges and for prosecuting those accused of criminal behaviour. The police consult the local Crown attorney for advice on the strength of evidence and on the laying of charges, or when they wish to obtain a search warrant. Tim Singh, the Crown attorney responsible for The Pas at the time of the Betty Osborne murder investigation, was located in Flin Flon. Although we do not know when Singh first became involved, Sergeant Grosenick told us that he probably had discussed the file with him from a very early stage.

The Director of Prosecutions in the Department of the Attorney General in Winnipeg requested a review of the file on November 15, 1972. Stan Nozick, then a Crown attorney in the Winnipeg office, did that review and concluded there was not sufficient evidence to warrant the laying of charges. He did, however, recommend a meeting of the Winnipeg Crown's office, the Crown attorney from Flin Flon and the police investigation team for the purpose of "brainstorming" the matter. Singh, however, felt that such a meeting would not serve any useful function and the meeting did not take place. A meeting later was arranged, on February 15, 1973, apparently by Nozick, with a number of Crown attorneys, including Singh, but not the investigation team. As a result of this meeting, it was decided that it was not possible to lay charges and that the RCMP should attempt to identify the brassiere. The file was to remain open.

In December 1985, when Constable Urbanoski completed his review of the file and had interviewed all the available witnesses, he submitted the file to the Attorney General's department for advice on whether it warranted charges being laid. After many discussions among the Crown attorneys and the RCMP, charges were approved against Colgan and Johnston on August 13, 1986. They were charged in October 1986. Their preliminary hearing was scheduled for March 10, 1987.

On March 9 the preliminary was postponed because Colgan offered to give evidence about the events of the evening if the charges against him were dropped. After consulting with the Director of Prosecutions, the Crown attorney, George Dangerfield, granted the immunity to Colgan and the charges against him were stayed. Charges were then laid against Houghton and a preliminary hearing for Houghton and Johnston was set for July 6, 1987. At the preliminary they were committed to trial, and their trial for first degree murder began on November 23, 1987. On December 2, 1987 Johnston was convicted of second degree murder and Houghton was found not guilty. George Dangerfield was the Crown attorney at the trial. He also appeared at Johnston's unsuccessful appeals to the Manitoba Court of Appeal and to the Supreme Court of Canada.

Supervision within the Attorney General's Department

We understand that in 1972 the local Crown attorney had not been in that position very long, and we question the degree of supervision and assistance he received from more experienced Crown attorneys in the Attorney General's department. We suggest that, as with the RCMP, the Crown office should be organized so that the full resources of the department, including advice from experienced head-office Crown attorneys, not only should be available, but should be injected into the local office when major crimes are being investigated and prepared for trial.

We think it was a mistake for the Attorney General's department to have allowed the local Crown attorney to veto the meeting suggested by Stan Nozick in 1972 with the local Crown, a representative of the Winnipeg office and the investigation team. The advice of Nozick should have been followed. Several witnesses, including Serge Kujawa from Saskatchewan, said that such meetings are important and can be productive. New insights may result from the intense scrutiny possible in such a brainstorming session. New minds brought to bear on the known facts and issues may bring to light new angles on the crime, the suspects and the investigation. We do not, of course, suggest that a major breakthrough would have occurred, only that it might have.

WE RECOMMEND THAT:

- Supervision by senior Crown attorneys be mandatory when serious crimes are being investigated and prosecuted.

Crown Decisions

Both the police and Crown attorneys can lay charges. The usual practice is for the police, after having sought the advice of a Crown attorney, to lay charges and then to pass the file over to the Crown attorney's office for prosecution. The office of the Crown attorney may refuse to prosecute the charges laid by the police. In that case, Crown attorneys can substitute other charges or decide to stay proceedings.

The duties of the Crown attorney were referred to in the Supreme Court of Canada in 1955 when Mr. Justice Rand said:

> It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. (*Boucher v. The Queen*, [1955] S.C.R. 16 at 23–24)

These duties now are laid out in Principle 9 or Rule IX of the 1987 Canadian Bar Association Code of Professional Conduct. It reads in part:

> When engaged as a prosecutor the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits.

When deciding whether a charge should be laid, the Crown attorney must keep this duty in mind.

The Crown attorney must not allow charges to be laid which are not properly supported by the facts or the law. Criminal guilt, in relation to serious crimes such as those involved in the abduction and murder of Betty Osborne, requires proof of two elements. First, it must be proved, upon admissible evidence, that the accused committed some act in furtherance of the illegal activity. This is the factual element of the crime. Second, it must be proved, upon admissible evidence, that the accused possessed the necessary intent to commit the act. This is the mental element of the crime. Only where evidence exists which proves these two elements can a charge properly be laid.

The Crown attorney should advise the laying of charges only when the following question can be answered in the affirmative:

Could a judge, or a jury properly instructed and acting reasonably, convict the accused or the accuseds, based on the admissible evidence as presented by the police to the Crown attorney?

Where doubt exists that a conviction would result, it is the responsibility of the Crown attorney to advise the police to continue their investigation. If the evidence

reveals that a conviction might result on a different charge from that suggested by the police, it is the responsibility of the Crown attorney to advise the police of that fact. If certain evidence is necessary for a conviction, the Crown attorney should advise the police of the deficiencies in their case and offer any advice which might seem appropriate.

The Early Decision Not to Prosecute

Both the local Crown attorney, Tim Singh, and the Winnipeg office agreed in December 1972 that there was not sufficient evidence to warrant the laying of charges. While by that time the police were quite certain that they knew the identity of the persons involved, the evidence they had was, for the most part, unreliable, very weak or inadmissible.

They had the anonymous letter identifying Colgan, Houghton and Manger. However, since the letter also contained inaccuracies they could not be certain of its reliability. In addition, without the writer of the letter, its contents would not have been admissible. Even if she had been in court her testimony would have been limited by rules of evidence. If her information was based on what Colgan told her, her evidence only would have been admitted against Colgan if he were on trial, but could not have been admitted against any other accused.

The police also knew that the piece of the brassiere found in the Colgan car had once been part of the bloodstained brassiere found along the road near the site of the murder. They knew that hair similar to Betty Osborne's had been found in the Colgan car. And they knew that a blood stain had been found on the rear seat of the Colgan car. None of this evidence was conclusive. The brassiere on the road was never identified positively as having belonged to Osborne. Neither could the blood nor the hair be identified positively as hers—although both were similar to hers. And even if they had been, it was impossible to prove that they had come into the car on the night of the murder.

Urbanoski's report shows that the police had Brian Johnson's statement that he had ridden in the Colgan car with Colgan, Houghton and Manger on the night of the murder. Johnson said that when he was in the car, Colgan was driving, and that he later saw Houghton driving. Even that testimony offered no direct link to the murder. There was the evidence of the cab driver, Philip McGillivary, who saw the car near the scene on the night of the murder. There were a number of problems with this evidence. McGillivary had described the car as being light blue. It was in fact white. Furthermore, it was not known whether the evidence gained from hypnosis was admissible. No hypnosis evidence has ever been admitted in Canada. And again, because the windows of the car were fogged, the cab driver could not see how many persons were in the car. Consequently, his evidence too provided only a tenuous link between the Colgan car and the murder scene.

Urbanoski's report shows that late in June 1972, two informants related to the police the rumours that were circulating in town as to the identity of the murderers. One of these informants told them that the fourth man was Johnston. These informants had not heard any confessions themselves. Since it was hearsay, their evidence would not be admissible.

The police also had what might have been a limited admission by Colgan. When interviewed by Corporal Duncan on September 24, 1972, Colgan is reported to have admitted being at the scene but claimed that he had done nothing and was afraid of the

others. He is also said to have commented, "Oh the brassiere and the blood, well that doesn't prove anything." Since these comments were made without Colgan having been cautioned or charged, the RCMP felt that they would not be admissible. The RCMP also had the statements by Colgan's father that he knew that his son had been at the murder scene but that he had done nothing. This, of course, would not be admissible in court unless the father was prepared to say what his son had told him.

The police, therefore, had some very weak evidence against only one of the suspects: Colgan. None of that evidence suggested that Colgan had taken part in the actual murder. Even the limited admissions made by Colgan and his father were not useful because they exonerated Colgan rather than implicated him in the murder.

The decision not to lay charges in 1972 was, in our opinion, the correct one in law. Since they had no admissible evidence against Houghton, Johnston or Manger, the police could not have charged any of them, at that time. Although they had knowledge of rumours indicating Colgan's presence at the scene and circumstantial evidence linking the Colgan car, we do not think that such evidence warranted the laying of charges. There was only very equivocal admissible evidence linking the Colgan car to the murder. Colgan's admission to Duncan was, in all probability, inadmissible, but even if it were admissible, it did not link him to the murder. There was a high probability he was in the car when Osborne was abducted. There was no evidence that he was a part of any agreement that Osborne be abducted. There was no evidence that he took part in either the assaults or the murder. We do not think that the evidence against Colgan in 1972 would have been sufficient to enable a properly instructed jury to convict him.

Constable Urbanoski told us that his review of the file revealed that in 1981 the police asked the Crown attorney's office in Winnipeg whether the admissions might form the basis of a charge against Colgan as a party or for aiding and abetting. The Crown, Urbanoski told us, simply said no, that that "would not hold water at all." That would appear to have been a reasonable conclusion.

A charge of aiding and abetting requires proof of assistance or of enabling the principal offender to escape. An admission of "being there" is not an admission of having participated in the murder. A person has to take some active part in the planning or carrying out of an offence before guilt can attach to that person. A mere bystander cannot be convicted of an offence committed by someone else. Merely maintaining silence as to the identity of a murderer is not a criminal act.

The Court of Appeal, in its rejection of Johnston's appeal of his conviction for Betty Osborne's murder, commented that it was once a crime to know the identity of a criminal and remain silent, and suggested it might be time to revive the charge in order to prevent persons such as the four suspects in Osborne's murder from remaining silent. Although knowing the identity of a murderer and remaining silent about that knowledge was a crime in Great Britain until 1967, it has probably not been in Canada since 1892.[1] While

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1 The crime of misprision of a felony was a common-law offence.
S. 8 of the *Criminal Code*, S.C. 1953–54, c. 51, now R.S.C. 1985, c. 46, s. 9, reads in part:

> Notwithstanding anything in this Act or any other Act no person shall be convicted
>
> (a) of an offence at common law....

we sympathize with the frustration from which this sentiment comes, we do not feel that such a recommendation is supportable in the post-*Charter* age.

On the other hand, had charges been laid against only Colgan, he might very well have sought an immunity deal much earlier than he did. The police knew that Colgan's father had some misgivings about the quality of the advice his son was receiving from D'Arcy Bancroft. Urbanoski told us that on October 29, 1972, Colgan's father told Corporal Stewart and Constable Moorlag that he felt that Bancroft was not acting in his son's best interests. Given that, it does seem that had Colgan been charged, even with lesser charges, his father might have sought the advice of a new lawyer. And that lawyer might have advised Colgan to seek a deal with the Crown.

However, the mere possibility of Colgan's having a change of heart as a result of being charged would not, in our opinion, have warranted a charge being laid. There was no available evidence upon which any sort of charge could have been laid and successfully prosecuted until the various witnesses came forward and told of comments made by Colgan at social events. Even then almost all the evidence was exculpatory, only proving that Colgan was in the car at the scene. His admissions did not disclose any involvement in the murder itself. We do not say that an early charge necessarily would have resulted in Colgan's cooperation. The evidence to support a conviction was very slim and we do not criticize the Crown for not wanting to settle for any charge less than murder. That charge certainly could not have been laid in 1971 or 1972.

The Case against Colgan and Johnston

When Constable Urbanoski took over the file full time in 1983, his intent was to keep working on the file until murder charges could be laid. In 1985, when Urbanoski had completed his review and had interviewed all the available witnesses including those new ones identified through the newspaper article, he submitted the file to the Crown Attorney's office once more. In August 1986, after a great deal of discussion among the Crown attorneys and the police, charges of first degree murder against Colgan and Johnston were authorized.

Even at this time the evidence by no means gave them a strong case. Of course, they still had most of the evidence that had been available in 1972. Philip McGillivary, the cab driver who had seen the Colgan car the night of the murder, had died. Consequently, it was no longer possible to place the Colgan car close to the scene on the night of the murder. They still had the evidence from the car. Urbanoski told us that by this time they also had a great deal more inadmissible "intelligence" which confirmed their belief that Colgan, Houghton, Johnston and Manger were all at the scene of the murder.

The evidence against Johnston was stronger, but it was still very weak. Following the newspaper article, one woman (Unidentified Witness #1) had come forward to tell police that she had been at a party in 1972 which Johnston also attended. She had heard Johnston say, "I picked up a screwdriver and I stabbed her, and I stabbed her, and I stabbed her." She also said that later in the evening she heard him make a comment to the effect of, "Do you know what it's like to kill someone?" and then add, "It feels great." This evidence, which was admissible because it would be recounted at the trial by the

one who actually heard the accused say it, directly implicated Johnston in a murder, although not necessarily that of Betty Osborne. Although weak, it was evidence upon which a jury could base a finding of guilt.

A tenuous link to the murder was provided by the evidence of Knut Christiansen, an admitted alcoholic. He recounted the story of an incident in 1972 when he was driving a car with Johnston in the back seat. The two had an argument during which Johnston grabbed Christiansen around the neck, pushed a screwdriver to his throat and said, "Do you want the same thing as that fucking squaw got?" This story, if believed by a jury, would have provided another link to the Osborne murder. It was not a direct admission by Johnston that he killed Osborne or was even at the murder scene.

These witnesses could have provided evidence upon which a jury might have based a finding of guilt. Nevertheless, the Crown must have had some concerns about the first witness, since she was only 14 in 1972 when the comments were made. Christiansen was an extremely poor witness and acted in a belligerent manner at the preliminary hearing. Christiansen, incidentally, claimed to have seen Colgan, Johnston, Houghton and Manger in the car on the night of November 12, 1971, and to have seen them pull an Indian woman into the car around midnight. The fact he was not called at the trial indicates that the Crown felt that he was such a poor witness he would only damage its case. Dangerfield said of him:

> He became a very unsatisfactory witness. He was a bad drinker himself. And so ... between counsel, we decided not to put him in the case. (p. 1001)

The evidence against Colgan at that time was weaker still. It consisted of admissions he had made of being present but having done nothing. There was some evidence, however, that Osborne probably had been in the Colgan car and an implication that Colgan had been in the car with her. The fact that it took eight months for the Crown to make up its mind attests to the difficulty of arriving at the decision to prosecute Colgan for the murder of Betty Osborne.

There was a substantial amount of indirect evidence linking Colgan with Osborne's death. There was first the evidence of a murder: the discovery of Osborne's naked body and the vicious beating that she had suffered. This suggested a death occurring during an attempted rape. There was the discovery of her clothing, minus a brassiere, found nearby under some rocks. There was the discovery of a bloodstained brassiere alongside the road a short distance from the murder scene. A piece of the same brassiere was found in the Colgan car. Although the brassiere was never linked positively to Osborne, the blood stains and the close proximity to the murder site carried a suggestion that Osborne, the brassiere, the Colgan car and, in all likelihood, Colgan himself were associated with the abduction and murder.

Further evidence supported such a tentative conclusion. Osborne's broken glasses were found in a ditch close to the turn-off to the cabins of the Colgan and Houghton families. Two screwdrivers, one in all probability the murder weapon, were found close to the brassiere. A blood stain and hair similar to that of the murder victim's were found in the back

seat area of the Colgan car. None of the evidence in the Colgan car was linked directly and positively to the murder. Nevertheless, there was a strong implication of such a connection.

In addition to the physical evidence, there are the admissions made by Colgan through the years. The great difficulty with the admissions is that although Colgan made many confessions of his involvement in the events surrounding Osborne's murder, he never admitted to participating in the murder itself. All the persons who came forward told the police that Colgan admitted being at the scene but that, if he did mention the actual killing, he always claimed that he had remained in the car while one or more other persons had beaten and stabbed Osborne. Colgan never admitted to more than being in the car at the time she was murdered.

In order to sustain a charge of murder, the Crown must prove participation by the accused in an act which results in death and, in addition, that the accused intended to do something that he or she knew or ought to have known would result in death.

However, the *Criminal Code* provisions in effect in 1971 contained a further definition of murder which includes constructive murder. Section 230 defined murder as a situation in which one person causes the death of another while committing certain other offences such as abduction or assault, and in which the assailant means to cause bodily harm for the purposes of committing the offence. Proving Colgan's involvement in the abduction and assault of Betty Osborne might have brought him within the bounds of that section and might have resulted in a murder conviction against him. Such, indeed, was the theory with which Dangerfield approached the prosecution of Colgan in 1986.

Colgan's admissions to others included the admission that he, along with the others, had picked up Osborne with the intent of having sex. He told Annette Veito that it was he who picked up Betty Osborne and that they "had her stripped" by the time they got her to the airport. Unidentified Witness #2 told us that she was with Colgan and Randy Cudmore when Colgan told Cudmore that they took Osborne "to the lake for a gang bang." Colgan told Sheriff Wilson that Osborne got into the car willingly, but she was killed because "she did not want to screw for us." He told Veito that Johnston stabbed Osborne and he told Unidentified Witness #2 that Johnston killed her. There was also the evidence of Kathy Phillips that she had been told by Colgan that he had been in the car that night.

The Crown's belief obviously was that such evidence might have been sufficient to convict Colgan of murder. It clearly suggests a willing involvement on the part of Colgan in the abduction and assault of Betty Osborne. The fact that the abduction, assault and attempted rape resulted in Osborne's death might have been sufficient to have obtained a conviction of murder against Colgan.

Nevertheless, it must be noted that a conviction would have by no means been certain. In all but one of the statements given to the police by those who heard Colgan's admissions, Colgan is reported to have remained in the car at the scene of the murder. Only in the statement to Unidentified Witness #2 did he place himself outside the car when the murder occurred and even then he stated that as Johnston stabbed Osborne, the rest of them "fell to their knees." This particular piece of evidence, incidentally, only became public during the course of our hearings. Once Colgan had agreed to

testify and received the immunity, the evidence had no value. It could not be introduced against anyone other than Colgan, who had made the comment.

In only one statement, that to Veito, did Colgan implicate himself in the stripping and assault on Osborne. In all the other admissions, Colgan presented himself more as a bystander than as a participant in Osborne's abduction and assault. He told his wife that he was at the scene when the murder took place, but that he had done nothing. He also told her that he "was with the wrong people at the wrong time and the girl was killed." Colgan told Veito that he was in the car when Johnston came back for the screwdriver. There was, then, very little evidence that Colgan had caused any of the bodily harm eventually suffered by Osborne.

The case was weak, the evidence was primarily circumstantial and there was no certainty of obtaining a conviction. That being said, however, it is still our opinion that there was sufficient evidence upon which a jury acting reasonably might have convicted Colgan.

The Case against Johnston and Houghton

On March 10, 1987, when Lee Colgan received immunity from prosecution and made a statement to the RCMP, the first full version of the events of the abduction and murder became known.

As a result of what Colgan was prepared to say, the evidence against Johnston was strengthened considerably. His evidence placed Johnston at the scene and outside the car when Betty Osborne was murdered. It also showed Johnston committed an assault on Osborne in the car. The evidence of Unidentified Witness #1, who recounted the admission by Johnston that he had stabbed someone, was now linked to the Osborne murder by Colgan's testimony. It was possible now to dispense with the unreliable testimony of Christiansen. The probability of the conviction of Johnston was much stronger. There was clear evidence on which a jury might convict.

Armed with Colgan's statement, the Crown charged Houghton with murder. The evidence against Houghton, while weaker, also seems sufficient to warrant the charge of murder being laid. Colgan's evidence placed Houghton at the scene and outside the car when the murder took place. The fact that Houghton was out of the car when Johnston came back for the screwdriver, apparently the murder weapon, reinforced the possibility that Houghton might have been a participant in the murder. The evidence of two sets of boot tracks beside the drag marks which led to Osborne's body, and the two sets returning to the car, suggested that two persons had been involved in hiding her body in the bush. There was sufficient evidence upon which a jury might have made a finding of guilt in relation to charges against Houghton.

It should also be noted that although the evidence about Colgan's admissions to a variety of people implicates Houghton and Johnston, and to a lesser extent Manger, those people could not have introduced what Colgan told them as evidence against any of the others. To those who are unfamiliar with the rules of evidence, it might seem wrong that the admissions could not have been used against Houghton and to further strengthen the case against Johnston. Nevertheless, it is the law that such statements can be used only

against the makers of them. Statements by one accused may be used against the accused who made the statements, but may not be used against any other person.

For example, if Colgan told a witness that he assaulted someone, that could be used as evidence against Colgan. On the other hand, if Colgan told the witness that Johnston assaulted someone, that information would not be admissible against Johnston and could not be used as proof that Johnston did what Colgan alleged. Generally, only what one knows from one's own observations of another's activities is admissible in a court of law. Rumours fall into the category of hearsay and are not admissible in evidence.

There was still no direct evidence that Houghton participated in the actual murder. Nor was there evidence that Houghton took part in the assaults on Osborne, either in the car, at the cottage, or at the pump house. And not a single witness had heard any admissions from Houghton that he even had been at the scene the night of the murder. Nevertheless, it is our opinion that the murder charges against Houghton and Johnston were properly laid. Colgan became available as a witness and his evidence of what he saw and heard was admissible.

The Decision Not to Prosecute Manger

There was some evidence against Manger but it was not sufficient to support a charge. Manger had made no confessions or admissions to anyone. The evidence at the trial of Houghton and Johnston and at the Inquiry suggested that Manger moved his seat forward to allow Johnston to force Osborne into and out of the car. Colgan's evidence, however, suggested that Manger had done nothing else to assist, or interfere with, the activities of the other three. Indeed, he said Manger was cowering under the dashboard of the car when the murder apparently was taking place. In addition, all the evidence suggested that Manger was too drunk to form the requisite criminal intent. The evidence would not, we believe, support a charge of murder, kidnapping or of any offences related to the assaults on Osborne. If Manger had been sufficiently sober to form the intent to assist in the abduction by opening the door and sliding the seat forward in order to enable the others to get her into the car, he might have been convicted of being a party to the offence of abduction. While we suspect that he may have had the capacity to form that intent, there was clear evidence of his drunkenness which the Crown was entitled to take into consideration in its decision not to prosecute.

The Immunity Agreement

After he was charged with first degree murder, Colgan consulted lawyer Donald MacIver. Urbanoski told us that within "a couple of hours" of being arrested on October 3, 1986, Colgan, through his lawyer, indicated to the RCMP that he ultimately would be of use to the police. On March 10, the day appointed for the preliminary hearing, MacIver approached Crown attorney George Dangerfield and offered to have Colgan testify as to what he knew of the murder, in return for an agreement that he would not be prosecuted for his part in the events of the evening.

Dangerfield told us that he did not bargain with MacIver to have Colgan plead guilty to a lesser charge. He understood, he told us, that there would be no point in

making any counter-proposal. It had to be a total immunity. Although he made the decision to grant the immunity himself, Dangerfield did obtain an opinion on immunities from the Crown's office and did discuss the granting of the immunity with Wayne Myshkowsky, the director of prosecutions for the Province, and obtained his approval.

Granting an accused person immunity from prosecution carries with it the assumption that the person who has been granted immunity is getting away with something and is thereby circumventing the law. Both Dangerfield and Kujawa said that the procedure is resorted to only in very serious crimes where no other evidence is available and where all accused are likely to go free. Kujawa said that while the granting of immunity looks terrible, the alternative may be that no one will be convicted.

Dangerfield said that, at the time he was approached, he felt the Crown had a weak case. He was concerned that both accused might be acquitted. The Crown, without Colgan, had only two witnesses who could involve Johnston and none who could implicate Houghton. With Colgan's evidence they had someone who could speak about the abduction of Betty Osborne, about what happened in the car, the fact that Johnston was outside the car, the noises of banging against the car he heard, and that Houghton was also outside the car at the pump house about the time the murder was committed.

Kujawa felt that an offer of immunity sometimes may be necessary to get a conviction, but should be used only after everything else has been tried. In this case he said that his opinion was that the immunity deal was "entirely proper." His review of the file led him to conclude that, prior to Colgan's agreeing to testify, there was not enough evidence to warrant laying charges against anyone. He said: "It is not much of a deal when you are giving the guy nothing."

We agree with Kujawa that the immunity in this case was in all probability as good a deal as it would have been possible to make. Since we believe that the murder charge was laid on a weak basis, we do not think that the Crown had much with which to bargain. MacIver had told Dangerfield that the deal would be all or nothing. Kujawa did have some misgivings about the immunity agreement and the process by which it was granted. On immunity generally, he said the procedure is so serious and so delicate that an offer of immunity should not be made by anyone other than the Attorney General. Kujawa also felt that some of the wording might be changed. It should provide that the person will "truthfully testify," rather than, as here, that he would give evidence "to the best of his ability." He also felt that a full statement should be taken and that should be tied to the agreement. He said the Crown cannot challenge details later if they are not contained in a statement. Although the statement was not tied explicitly to the agreement in this case, Kujawa felt that no harm was done.

A further problem with the wording of the immunity agreement is the inconsistency between the wording of the first and second parts of the document. In the first part, the Crown granted immunity to Colgan in return for his testimony at the trial for murder. In the second part, Colgan agreed to testify in any proceedings against Houghton or Johnston in relation to the murder of Helen Betty Osborne. We believe that it should have been made clear that the immunity was granted in return for Colgan's evidence at any proceedings which might be related to the events of the night in question.

MANITOBA
Department of the Attorney General
Prosecutions
Box 2698
The Pas, Manitoba

March 10th, 1987

To: Lee Scott Colgan,
Accused

And To: Donald N. MacIver,
Counsel for the Accused

Dear Sirs:

I am instructed to tell you that in return for your client giving evidence in respect of the murder of Helen Betty OSBORNE, on November 13, 1971, both at the preliminary hearing and subsequent trial of Dwayne Archie JOHNSTON and James Paul HOUGHTON for the murder of Helen Betty OSBORNE, that the charge of Murder in the First detree [sic] will be withdrawn against Lee Scott COLGAN and that no further proceedings will be taken against Lee Scott COLGAN in relation to that charge of Murder, a charge of Rape, or any other offence in any way related to the murder of Helen Betty OSBORNE, November 13, 1971.

This undertaking by me as an agent of the Attorney-General is given on the understanding that Lee Scott COLGAN will give evidence to the best of his ability when called upon to do so, but does not depend on the outcome of the proceedings against James Paul HOUGHTON and Dwayne Archie JOHNSTON.

[signed]
J.G.B. Dangerfield
Counsel for the Crown

I, Lee Scott COLGAN, understand these terms set out above and agree to give evidence to the best of my ability, according to them in any proceedings taken against James Paul HOUGHTON and Dwayne Archie JOHNSTON or either of them arising out of the murder of Helen Betty OSBORNE, November 13, 1971.

[signed]
Lee Scott COLGAN (Exhibit 23)

Colgan's Immunity Agreement

WE RECOMMEND THAT:

- In completing agreements of immunity the Crown follow these principles:
  - Agreements of immunity should be made only after a discussion between the director of prosecutions and the Attorney General.
  - The Attorney General should sign all agreements of immunity.
  - Complete immunity should be granted only where it can be justified properly.
  - A witness statement should be taken and referred to in the immunity agreement.
  - The wording of the agreement should require that the person receiving the immunity testify truthfully.
  - Agreements of immunity should be written carefully with consistent wording throughout, requiring the person receiving immunity to testify in all related proceedings.

Did Colgan Breach His Immunity?

Questions about the immunity granted to Lee Colgan were raised before the Inquiry. There was concern as to whether Colgan may have breached his immunity agreement by changing his evidence from that given at the preliminary hearing to that given at the trial, regarding the time Houghton spent outside the car at the pump house. Counsel for Justine Osborne and the Norway House Band in his final submission suggested that the provincial Justice department should "take a serious and in-depth look" at revoking the immunity and prosecuting Colgan. This, coupled with the fact that the visit of Colgan to Houghton's lawyer indicated a willingness, at least at that point, to change his testimony, requires that we look closely at Colgan's testimony.

Colgan gave a number of versions of the events of that night. He wrote a "diary" for his lawyer, MacIver, at the time of his arrest. He gave two statements to the police before the preliminary hearing, he gave testimony at the preliminary hearing and at the trial, he appeared before us, and, of course, he made a number of "confessions" to various members of the community. No two versions are identical. We identify three major areas of variance. First, there are discrepancies as to the length of time Houghton was outside the car at the pump house. Secondly, there is a difference regarding Johnston's comments when he returned to the car at the pump house for the screwdriver. And thirdly, there is the testimony that Colgan gave for the first time at the trial regarding Houghton's purpose in getting out of the car at the pump house.

Some variance can be expected in a case such as this where one is relying on the recollections of a witness who was intoxicated at the time of the event—an event which occurred many years before. What makes the changes the subject of such concern is that they all benefit Houghton. Adding to the concern is Colgan's admission before us that he had, in his evidence at trial, attempted to make Houghton look "good." The changes might not, therefore, be the result of poor recall. There is a chance that they were the result of a conscious decision by Colgan to adjust his testimony to help his friend Houghton. If that were to be found to be the case, the Crown would be justified in charging Colgan with perjury, and perhaps even lifting the immunity and charging him for his participation in the assault and death of Osborne. It is also possible to find the immunity agreement was breached without a conviction for perjury.

Before examining Colgan's testimony, it is necessary to preface our remarks with a discussion of the law of perjury. Section 131 of the *Criminal Code* provides, in part:

> [E]veryone commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

Section 132 provides, in part:

> Everyone who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years ...

Finally, section 133 provides:

> No person shall be convicted of an offence under section 132 on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

What this means is that in order to convict for perjury, the Crown must prove first, that the accused intended to mislead and second, that the accused knew the statement to be false. Third, there must exist some corroboration that the accused knew that the statement was false. Some doubt exists as to whether corroboration is necessary where the accused admits to the false statement. In *R. v. Bouchard* (1982), 66 C.C.C. (2d) 338 (Man C.A.), the Manitoba Court of Appeal, Chief Justice Monnin held that s. 133 was not relevant where the accused in various statements contradicts himself or herself. Mr. Justice O'Sullivan was of the view that corroboration remained necessary, while Mr. Justice Matas decided on another ground and made no comment on the issue.

The changes in the statements regarding Johnston's comments when he returned to the car for the screwdriver are the easiest to assess. Houghton, it will be remembered, was outside the car when Johnston returned for the screwdriver. At the preliminary hearing Colgan was asked by the Crown, "Did he say anything to you at this time?" Colgan replied, "Just some thing to the effect, 'Find him something.' I don't know for sure." At the trial,

when asked a similar question, he replied at first, "I'm not sure if he—I asked him what he was doing I think, but ..." And when asked again, he said, "I don't think he said anything."

Before us, the story changed again. When questioned on direct examination by counsel for the Inquiry, he replied, "Something about getting something, I think, I'm not sure right now, at the moment." During cross-examination by counsel for the Indigenous Women's Collective, he was asked, "Did he [Johnston] say anything to you when he came to the car?" Colgan replied, "Just something about 'Get me something,' or something to that effect." It can be seen from this that Colgan went from having Johnston "find him" something, which suggests that the screwdriver was for Houghton to use, through not remembering anything, to relating a statement which suggests that Johnston was getting the screwdriver for his own use. The screwdriver, of course, was the murder weapon.

Clearly, there was a change of evidence here which benefited Houghton. However, this would not be evidence which could be admissible against Houghton. This statement, made by Johnston to Colgan and related to the court by Colgan, would be inadmissible as hearsay in relation to the charges against Houghton. It would, of course, be admissible with respect to Johnston since it was he who made the comment. It might suggest that Johnston did not actually commit the murder. It would, nevertheless, show sufficient involvement to support the murder charge, since obtaining the weapon could make him a party to the offence, even if he did not actually use the screwdriver. It is a statement which, if it had been admitted at trial, might have encouraged the jury to believe that Houghton, and not Johnston, had committed the murder. We know that Colgan has admitted that he attempted to make Houghton look good. The transformation of that comment, since it clearly helps to make Houghton look good, might be seen by a judge to be an attempt to mislead. And that might be sufficient to support a charge of perjury. It is, however, unsupported by corroboration and, therefore, might not be sufficient to warrant a conviction. Only Johnston and Manger could give such corroboration. Johnston has refused to talk and Manger claims to remember nothing. Corroboration is impossible. Of course, if Chief Justice Monnin in *R.v. Bouchard* is correct, there would be no need for corroboration.

It is possible there was no attempt by Colgan to mislead on this point. It might be that these comments represented his true recollections. On all three occasions he was very unsure of what was said or whether anything was said. All this would make conviction of Colgan on a charge of perjury difficult to obtain.

The second issue concerns the time spent by Houghton outside the car at the pump house. The sequence of events at the pump house is as follows:

When the car arrived at the pump house, Houghton was driving. Manger was in the front passenger seat and Johnston, Colgan and Osborne were in the back seat. Colgan said Johnston got out of the car, taking Osborne with him. There followed a period of time, some five to ten minutes, when the three men remained in the car while banging was heard against the rear of the car. At some point, Houghton got out of the car. Some time later, and the time varies, Johnston returned and got the screwdriver. It is clear that at this point, Betty Osborne was still alive since Colgan saw her standing almost naked outside the car when the door was opened. A second period of time passed, after which Colgan climbed into the front seat and turned the car around. Colgan called out to

Houghton and Johnston that they were leaving. Someone responded, "Just a minute." Finally, after another lapse of time, Houghton and Johnston returned to the car and they all left with Colgan driving. Colgan's testimony was consistent on the fact that when Houghton got out of the car, Osborne was alive, and that when he returned, she was dead. The importance of the period of time, of course, is that the longer Houghton was out of the car, the more likely it is that he was involved in the murder.

In a diary written for his lawyer, dated October 15, 1986, Colgan states that Houghton was out of the car for "about five minutes" before Johnston returned for the screwdriver. In his statement to the police on March 10, 1987, Colgan states that Johnston returned to the car "about five minutes" after Houghton left the car. At the preliminary hearing, Colgan stated that Houghton was outside the car "a while" before Johnston returned and at the trial the time was described as "just a brief moment I think."

Before us, Colgan was questioned at length about the time. He was very vague. His first response was: "It didn't seem like a long time. It could have been anywhere from a minute or two, or less, or more, I guess." When he was asked, "It could have been five minutes?" he responded, "I don't think it was that long," and then added, "Could have been." Finally, he agreed that Houghton could have been out of the car for five minutes.

It is clear that the length of time gets shorter through the various statements, from five minutes in October 1986, through a brief moment at the trial, and back to possibly five minutes before us in June 1989. While this looks suspicious, the shortening of the time, from "a while" to "a brief moment," between the preliminary and the trial, is very equivocal.

All this could be interpreted as Colgan's deliberately having varied his testimony at the trial and placed Houghton outside the car for a considerably shorter time than in his other statements. It is, however, equally consistent with his having faulty recollection. On this point too, without corroboration that he intended to alter his testimony, a conviction would be unlikely to result.

The third troublesome area of Colgan's testimony relates to the intentions of Houghton when leaving the car at the pump house. At the trial, in direct examination, Colgan stated that he asked Houghton to "get out of the car to stop them [Johnston and Osborne] before anything got too bad." This was the first time that Colgan remembered any comments he made to Houghton at the pump house. In his diary, he stated: "Jim [Houghton] got out to see what was happening." In his March 1987 statement to the police he said much the same thing: "I guess Jim got out to see what was happening." In the April statement to the police, the following exchange took place:

> Q In the statement to your lawyer, you mention that Dwayne [Johnston] had taken Betty outside the car and that "Jim got out to see what was happening. There was some banging outside the car." Is that accurate?
>
> A The banging on the car, I think happened before Jim got out. I am not sure if I asked Jim to go out and stop him, 'cause they were banging against the back of the car. I think we may have been sitting inside drinking wine, unless it was all gone by then. (Exhibit 56, p. 3)

At the preliminary hearing, Colgan first revealed that he had remembered that he spoke to Houghton in the car at the pump house. After it was noted that the banging on the car had lasted approximately five minutes, the following exchange took place:

Q Alright, what happened then?

A Well, we were getting a little worried because we didn't know what was going on. I asked Jim to go out and stop what was going on because he was the biggest one in the car. (Preliminary Inquiry, p. 341)

This was substantially similar to the testimony at the trial.

In response to some leading cross-examination by Houghton's lawyer, at the trial Colgan remembered that Houghton too had said something. The exchange, which follows a discussion of the banging on the car, goes as follows:

Q And you were talking, the three of you about how bad this was when you heard the noise out there, weren't you?

A Yes.

Q And you were worried about it, all of you, Jim, you, Menger, [sic] you were all worried about what was happening, weren't you?

A Yes.

Q And you decided that Jim, because he was the biggest, should try to go out and stop it. Isn't that right?

A Yes.

Q And he said, "I'll try." Isn't that right?

A I don't know what he said. He got out though.

Q He agreed to go stop it, didn't he?

A Yes.

Q That's why he got out, isn't it?

A Yes.

Q And you know that to be true, isn't that right?

A Yes.

Q He got out to stop this, not to hurt this girl. Isn't that right?

A Yes.

Q And you have no reason to believe that he went from trying to help this poor girl into killing her, do you?

A No. (Trial, p. 503–4)

While this evidence, which was very favourable to Houghton, was new, it was consistent with his earlier preliminary hearing statement that Houghton had left the car at the pump house to stop Johnston.

Colgan himself denied that he had changed his testimony, although he admitted before us that he had attempted to make Houghton look good. When he was examined on the issue before us, this exchange took place:

Q At the trial, while giving your evidence with respect to this matter, did you attempt to colour it or shade it in any way to put Houghton in the best light possible?

A Mr. Houghton was a very good friend of mine, and I told the truth at the trial. I didn't change anything to my knowledge.

Q Did you in any way colour or shade your evidence to put Mr. Houghton in the best light that you possibly could?

A I wanted him to look good, yes. (p. 1339)

This raises a suspicion that Colgan may have changed his testimony. However, in our opinion it is not a sufficiently strong suspicion to warrant a perjury charge. More importantly, perhaps, we do not think that the evidence before us is sufficiently strong to support the contention that Colgan breached the terms of his immunity agreement.

The Conduct of the Trial

Generally, the lawyers acting for the Crown and for the accused (Greg Brodsky for Johnston and John Scurfield for Houghton) did so in the accepted manner. Counsel for the two accused cross-examined vigorously, and in their submissions told the jury of the various theories and verdicts suggested by the evidence. They argued that the Crown had not discharged its onus of proving the guilt of the accused beyond a reasonable doubt. We find that each of the defence counsel acted in a thorough manner throughout the trial.

Some criticism was levelled against the Crown for the way in which the evidence regarding the footprints found at the scene of the murder was entered. We noted in Chapter 4 that the map prepared by Cpl. Harold Bielert, of the footprints found at the scene, did not contain a complete record. Bielert, it will be remembered, failed to map the footprints leading from the blood stain where Betty Osborne's body had first been laid, to the place where she had been found. At the trial, Bielert entered the map he had made into the evidence but was not asked to explain its content. In cross-examination, John Scurfield questioned Bielert in some detail about the map and the photographs he had taken of some of the footprints. Having discussed the footprints from the parking area to the mounds where Osborne had first been laid, Scurfield went on to ask about the footprints from that place to the last resting place.

The following exchange took place:

Q Now you indicated that on the diagram you've indicated something which is called, "Body drag marks," is that correct?

A Yes, sir.

Q And from that I see there—with the exception of the tracks which are noted to be south of the body drag mark [leading away from the body to the parking area], you didn't note any set of tracks, distinct or otherwise either to the immediate north or the immediate south of that drag mark, is that correct?

A That is correct.

Q And I take it that if there had been tracks which you in your judgement considered to be foot tracks, either immediately north or immediately south of the drag line, that's something you would have thought important and put into your diagram, isn't that correct?

A Yes, Sir.

Mr. Scurfield: I don't have any further questions of this witness. (Trial, p.127)

This testimony left the distinct and erroneous impression that Bielert did not see the footprints following along either side of the drag marks.

Dangerfield did convince the judge to allow him to re-examine Bielert and he asked the following questions:

Q You said that you, when you examined the tracks, you made some notes about the drag marks, can you tell me whether there was any disturbance on either side of the drag marks?

A Yes, Sir, there was.

Q What sort of disturbance was there?

A There were footprints.

Mr. Dangerfield: Thank you very much. (Trial, p. 147)

With this discussion, the matter was clarified, although not emphasized. In view of the strength of the cross-examination and the importance of the issue, the re-examination might have been more comprehensive. Perhaps other officers also should have been called to make it clear there were two sets of footprints leading to the bush and back from the body.

While Serge Kujawa felt that the evidence was entered adequately, he commented that it would have been "helpful" if another officer had been called to clarify the point. The evidence relating to the footprints found at the scene was an essential aspect of the Crown's case, particularly against Houghton. The evidence was brought in in a rather confused manner and that confusion could only assist the accused.

Ultimately, Dangerfield did make the issue clear. In his address to the jury he pointed out that there were two sets of prints leading to the place where Osborne's body was found and two leading away from it. Scurfield, Houghton's lawyer, made the point that the prints were not on the map and that Bielert had stated that the map showed all the footprints in the vicinity of Osborne's body. He also commented that Bielert at first had described the two sets of tracks as "disturbances." The trial judge,

Mr. Justice Schwartz, in his address to the jury properly noted that whether there were two sets of footprints beside the drag mark was for the jury to decide.

These comments apart, we do not think that the Crown attorneys are to be faulted for their handling of the trial. While some might have expected that the evidence would have caused the jury to convict Houghton as well as Johnston, it must be recognized that there probably was some reasonable doubt as to what, if anything, Houghton actually did or intended to do when he was outside the car. Proof beyond a reasonable doubt is the test required by our law.

The Laying of Lesser Charges

Our mandate requires us to consider whether the proper charges were laid in relation to the murder of Betty Osborne. We believe the Crown was correct in laying murder charges against Colgan and Johnston in the first place, and later against Houghton when Colgan became available as a witness. We also find that it was right for the Crown not to have charged Manger. Colgan could not be prosecuted once the immunity agreement had been signed and he had testified at trial. At the time the *Criminal Code* stated that no charge other than murder could be included in an indictment for murder. Consequently, it was not possible for the Crown to prosecute Johnston or Houghton on a lesser charge at the same time as the murder charge. The *Criminal Code* now has been amended to permit the Crown to join other charges with a charge of murder as long as all charges arise from the same incident.

Only one issue remains: whether Houghton should have been charged with another offence after he was acquitted of murder. In considering this matter, we are mindful of the decision of the Supreme Court of Canada in *Starr v. Houlden*, [1990] S.C.R. 1366, which, among other things, directs commissioners not to make findings of criminal or civil liability.

When the Crown proceeded against Johnston and Houghton, it hoped to obtain a murder conviction against both. However, the jury convicted Johnston and acquitted Houghton. We do not know the basis for either decision and, because it is illegal for jurors to disclose anything that transpired during their deliberations (*Criminal Code* s. 649), we will never know.

With the acquittal of Houghton the matter was ended as far as the Crown was concerned. He had not been charged previously with other offences related to the events of November 12 and 13, 1971. No consideration was given to charging him with other offences after his acquittal.

Crown attorney George Dangerfield was asked why additional charges were not laid. His response was that it was not usually done and that he had never done so. He never considered doing so in this case. Serge Kujawa told us that he followed the same practice and that he hoped all Crown counsel in Saskatchewan did likewise. Neither was able to indicate where the practice of not laying lesser charges originated.

There have been, however, cases where other charges have been proceeded with after a person has been acquitted of murder. The most recent one in Manitoba of which we

were made aware is *R. v. Kirkness* (1989), 58 Man. R. (2d) 131 (Q.B.), where the Crown chose to proceed with charges of break and enter against Kirkness after his acquittal for murder.

We gained the impression that lesser charges generally are not laid after an acquittal on the basis of a feeling that to do so would be unsportsmanlike; would not be "cricket." We can understand that approach when viewed from the standpoint of counsel. The Crown takes its "best shot." If it fails, that is that. Such an approach is commendable in a way and fits with the British sense of justice and many traditions of the bar. We do not, however, believe that such a practice is in the public interest. Society would be better served by having all those who take part in serious criminal activity brought to justice for their involvement. It would be more fair to the accused to lay other charges at the earliest possible time, but we do not believe that it is wrong, where circumstances warrant, to lay further charges after an acquittal on a charge of murder.

WE RECOMMEND THAT:

- The Crown end its practice of declining to consider further charges after an acquittal of murder.

When pressed during questioning, Dangerfield gave further reasons why he did not think additional charges should be laid against Houghton. These reasons included the passage of time and likelihood that a defence of delay under section 11(b) of the *Canadian Charter of Rights and Freedoms* might have succeeded. He was also concerned that, since Colgan's evidence at the murder trial was not believed, it could not support other charges. We do not agree that Colgan's evidence was not believed. The acquittal at trial meant only that the jury had found that the evidence did not support a murder conviction.

We are not certain that the delay caused by a properly pursued murder charge would give rise to a section 11(b) *Charter* challenge on lesser charges. In 1989 in its decision in *R. v. Conway*, [1989] 1 S.C.R. 1659, the Supreme Court of Canada found that the delay caused by two previous trials which had been overturned on appeal, together with other delays due to complications in obtaining counsel, did not amount to a delay which would prevent a third trial from being held. In that case a five-year period had elapsed since the laying of the charges to the commencement of the third trial. However, we concede that the question is not resolved easily, nor is it for us to determine.

We believe the Crown should have acted after Houghton's acquittal of murder. The Crown should have considered whether the evidence would support any other charge. It seems to us that the Crown should have considered whether charges of abduction, assault or accessory after the fact to murder should have been laid. If, in its opinion, these or other charges could have been proved, the appropriate charges should have been laid. If it decided there was insufficient evidence to prove any other charge, that would have been the end of the matter.

Our opinion is that a prosecution should not have been avoided on the basis that a *Charter* challenge might have been made. We believe that the seriousness of the incident warranted the consideration of additional charges. Even now we believe the Crown should review the matter to determine whether the evidence against Houghton warrants the laying of other charges. We do not, in view of the *Starr* decision, make any suggestion of the likelihood of his conviction.

WE RECOMMEND THAT:

- The Crown consider whether additional charges should now be laid against James Houghton.

CHAPTER 8

THE JURY

There were no Aboriginal persons on the jury which tried James Houghton and Dwayne Johnston. All the Aboriginal persons who were called for jury duty were challenged peremptorily by Johnston's counsel. The systematic exclusion of Aboriginal persons from a jury in an area where Aboriginal persons make up such a large proportion of the population is very troubling.

The Composition of the Jury Panel

Every year a "jurors' roll" is prepared by the chief sheriff of the province for the various areas of Manitoba in which the Court of Queen's Bench sits with a jury. The jurors' roll is prepared by random selection by computer from the Manitoba Health Services Commission records. When an assize is called, the sheriff is told the number of cases on the assize and the number of accused involved. In consultation with the chief justice, the local sheriff determines the number of people who should be summoned to serve as jurors and selects that number from the jurors' roll provided by the chief sheriff. The names of those summoned to appear for jury duty are termed the "jurors' list." The local sheriff then sends the selected names to the Office of the Sheriff in Winnipeg where the subpoenas are made up by the chief sheriff and returned to the local sheriff. The local sheriff then serves the subpoenas on the appropriate persons by registered mail.

The subpoenas are accompanied by documentation in English and French, intended to explain the obligations of jury duty to the recipient. The literature instructs

the recipient to call the sheriff and provides a telephone number. More than the needed number of people are subpoenaed as experience has shown that not all who are served respond. When the desired number of jurors responds by telephone, no further efforts are made to contact the jurors who were subpoenaed but have not responded. In addition, any who respond after the required number has been reached are advised they are not needed. The names of the jurors who respond to the subpoenas comprise the "jury panel" and they are told when the selection of a jury for the first trial on the assize will take place. On the appointed day, all those on the jury panel assemble in the court room and 12 jurors are selected from the panel.

The panel for the trial of Houghton and Johnston was drawn from the Judicial Centre of The Pas. As well as the town and the reserve community of The Pas, the Judicial Centre includes the city of Flin Flon and the Aboriginal communities of Pukatawagan, Sherridon, Moose Lake, Easterville, Brochet and Grand Rapids. The 1987 jurors' roll for the Judicial Centre of The Pas consisted of 800 names, of which it is estimated that 224, some 28%, were Aboriginal. It was decided that 100 persons would be required for the panel. Consequently, 247 subpoenas were sent out and 194 persons responded. Eighty-nine were given exemptions by the sheriff and 105 persons were placed on the panel. One of those was removed from the panel before the subpoenas were issued.

Of the 247 who were sent subpoenas, it is estimated that 61 were Aboriginal. It is not possible to determine the actual number with any real certainty because that information is not included in the jury roll. Twenty-two of the Aboriginal persons on the list failed to respond. Another 21 of the Aboriginal persons were excused from duty for various reasons, eight of them on the basis of difficulty with the English language.[1] Eighteen Aboriginal people were called and appeared as members of the panel of 105 people.

Of the subpoenas sent to potential jurors, 24% were sent to Aboriginal persons and Aboriginal persons made up 18% of the jury panel. The evidence indicated that the percentage of Aboriginal people in the area from which the jury was drawn is in excess of 30%. Ideally, it is intended that a jury be representative of the area from which it is drawn; that is, of the area where the crime occurred. Since the panel, in this case, was not representative, it is clear that the jury could not be.

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1 *The Jury Act*, R.S.M. 1987, c. J30 provides a number of grounds for exemption from jury duty. Two were excused for medical reasons. (s. 26(2)) One who was no longer resident in the jury district was excused. (3(b)) One correctional officer and two convicted prisoners were excused. (ss. 3(m), 3(p)) Two were deceased. Eight were excused because of difficulty with the English language. (s. 4) One was excused for "hardship" (s. 25(1)(b)), the exact nature of which was not recorded. Four were excused by the sheriff pursuant to s. 26(4). The nature of the basis for the exemption is not known. Section 26(4) reads: "Where a sheriff is satisfied on the basis of a declaration or other proof furnished to him under this section or of any other inquiry that he has made, that a person summoned as a juror is disqualified from serving as a juror or is entitled to be exempted from serving as a juror, the sheriff shall notify the person that the person is disqualified or exempted, as the case may be, and is not required to answer the summons."

The fact that similar discrepancies can be found in the jury panels throughout the province reveals a major failing of the justice system in Manitoba—one which indicates the existence of systemic discrimination. We can only conclude that these figures indicate that, in this aspect, the criminal justice system has broken down and does not serve the Aboriginal population properly. Also of concern is the high percentage of Aboriginal persons excused because of difficulty with the English language.

The Composition of the Jury

The names of those who are on the panel are written on cards and placed in a box. When the jury is to be selected, the members of the panel assemble in court and the clerk of the court draws the cards from the box one at a time and calls the person named on it. The person then comes forward. Either the Crown or the defence may challenge the potential juror. The Crown may order the juror to stand aside and go on to the next name. The *Criminal Code* allows the Crown attorney to challenge peremptorily, that is, without having to state any reason, four of the panel. (s. 634) In addition, the Crown attorney may stand aside any number of persons on the panel without stating any reason. (s. 634) In a first degree murder trial, a defence lawyer is permitted to challenge peremptorily 20 jurors. (s. 633) In addition, both the Crown and the defence can challenge any number of the panel for cause if they have reason to believe that those persons might be prejudiced for or against the accused. (s. 638) Any panel member who is found not to be impartial is excused. If there is no challenge, the member is sworn and becomes part of the jury. When 12 jurors are selected, the rest of the panel is dismissed and the trial proceeds.

According to the information supplied to us by Gerald Wilson, the sheriff who worked on the Osborne jury, 54 persons were called from the panel in the Osborne murder case before the jury was complete. Of these, six were Aboriginal, and all were challenged by Greg Brodsky, Johnston's lawyer, and did not sit on the jury. Johnston's lawyer used all his 20 peremptory challenges and Houghton's lawyer used 19 of his 20. The result was that there were no Aboriginal persons on the jury.

In this case, the victim was Aboriginal and the community in which the crime occurred had a large Aboriginal population. We are not suggesting that the jury in the trial of Houghton and Johnston was not impartial. Nevertheless, it must be stated clearly that the jury was not representative of the community from which it was drawn and in which the crime was committed. As well, we believe that Aboriginal people were excluded because of their race. Unfortunately, the jury selection process designed in our *Criminal Code* and *Jury Act* allows such practices to occur. We believe that such practices should no longer be allowed.

The exclusion of Aboriginal people from the jury fuelled public concern that racism might have played some part in the trial, as a result of which, one person went to jail for the murder of Betty Osborne. Certainly, the lack of Aboriginal jurors gives the impression that the trial, from the Aboriginal person's perspective, was not a fair one. And in a sense, it was not fair—the jury simply was not representative of the local community. We do not believe that this should be allowed to continue. Whether it is the

accused or the victim who is Aboriginal, the perception of a fair trial will be enhanced if Aboriginal persons are properly represented on juries. They are, after all, very much affected by the outcome of trials in their communities.

We believe that the exclusion of potential jurors on the basis of their race is an unacceptable and probably unconstitutional practice which should be ended by reform of the method of juror selection. We recommend a considerable overhaul of the jury system in Volume One of our report.

CHAPTER 9

RACISM

The mandate of the Inquiry directs that we investigate "whether there exists any evidence of racial prejudice with respect to the investigation of the death of Helen Betty Osborne." It has been suggested that the delay in bringing the case to court indicated racism and that the police would have exerted more effort if the deceased had been non-Aboriginal. It also has been suggested that residents of The Pas were in possession of valuable information and kept that information from the police because the victim was Aboriginal. After hearing all the testimony and reviewing the evidence, we have concluded that racism played a significant role in this case, but it did not cause any delay in the investigation of the killing or in the prosecution of those responsible.

The Nature of Racism

Racism is a particularly insidious and vicious form of discrimination because it stems from a mistaken belief in the superiority of one race of people over another. It is discrimination which occurs when people or institutions conduct themselves in a way harmful to others because of their race, or perceived race. Much debate has occurred for many years over the question of whether separate races actually exist. Many geneticists have concluded that there are no races as such, and that much of what passes for race is actually religious, colour or ethnic differences.

That debate really matters very little to the victims of racism. It is often their perceived race which leads to the act of racism. Whether or not there are races, there is racism, and racism is wrong.

Racism exists because of misconceptions and incorrect or unfounded stereotypes. The thrust of anti-discrimination laws is to prevent parties from acting upon those misconceptions and stereotypes, and to require that persons be evaluated and treated on the basis of their characteristics and abilities as human beings.

In our hearings it became apparent that Aboriginal and non-Aboriginal people had different perceptions of the prevalence and significance of racism in The Pas generally, and in this case in particular. We have heard different versions of what was going on in The Pas in 1971 both before and after Betty Osborne's murder. Aboriginal and non-Aboriginal people each have their own perspectives about that era and this case. One thing is clear, and that is that neither side is totally correct in its particular view. Somewhere in between the perceptions of both sides of the community lies the truth.

Racism in The Pas in 1971

It is not surprising that the Aboriginal community blamed the townspeople, the police and the justice system for the 16-year delay in bringing the case to trial and the eventual conviction of only one person. The town has long operated as a white enclave surrounded by Aboriginal people who were tolerated as customers but not welcomed as part of the community. There has been a disturbing lack of employment opportunities in The Pas for Aboriginal people, a lack of their involvement in civic affairs and a general lack of interaction between the two cultures. We believe that stems from and reveals the very real racism (intentional and unintentional) which underlies the attitude of our society generally toward the original people of this country.

There was, generally, an atmosphere of prejudice and bigotry against Aboriginal people prevailing in The Pas at the time of the murder, one which formed a backdrop to all social relations and interaction between Aboriginal and non-Aboriginal people. We were told of several kinds of mistreatment and insensitivity that seem to have been symptomatic of the social malaise:

- Aboriginal people were segregated from non-Aboriginal people in public facilities such as local beverage rooms, restaurants, the local movie theatre and the high school cafeteria.
- Aboriginal people received poorer service in stores and restaurants in The Pas.
- Non-Aboriginal men sexually harassed Aboriginal women, seemingly with impunity. They cruised the streets of The Pas regularly, trying to pick up Aboriginal women and girls for the purpose of having sex with them, a practice apparently well known to and ignored by the RCMP.
- Aboriginal men were chased and assaulted by non-Aboriginal males.
- Gang fights between Aboriginal and non-Aboriginal men occurred because of racial hatred.

- Although we heard of instances where sports were played together by Aboriginal and non-Aboriginal youth, we are satisfied that Aboriginal youth felt left out of activities involving non-Aboriginal youth in school and in local recreational programs.
- Few close friendships existed between Aboriginal and non-Aboriginal people in the community, with little if any family visiting occurring between them.
- Many non-Aboriginal residents of The Pas perceived public intoxication in the town as an "Indian problem" when it was really a problem which crossed racial lines.

These discriminatory practices seem to have been accepted by the majority of residents as a matter of course. They were not recognized as discrimination by most. The separation was a well-ingrained and accepted part of life in The Pas. We recognize that perhaps some Aboriginal people did not wish to associate with the general population either, but that, we believe, is not a major contributing factor to the racial problems.

Aboriginal People and the RCMP

There were also poor relations between Aboriginal people and the RCMP in the early 1970s. Many of the problems that arose have their roots in discrimination. Examples include:

- Police visits to the reserve were perceived by members of the band as occurring primarily for the purpose of pursuing an investigation into criminal allegations or to arrest Aboriginal suspects. Little effort apparently was made by the RCMP to establish a positive image or relationship with the leaders or members of The Pas Band.
- Police harassed Aboriginal people, particularly young males, walking the streets of the town.
- Police refused to take seriously the stories of Aboriginal women being sexually harassed by non-Aboriginal men.
- Police failed to investigate rumours of Aboriginal men being thrown into the river from the railroad bridge.
- Police were accused of over-arresting Aboriginal people for intoxication in the town of The Pas.

The Legacy of Historical Racism

The very reason that Betty Osborne was compelled to leave her home and move to The Pas also was rooted in racism. Like so many other Aboriginal young people, she was forced by long-standing government policy to move to a strange and hostile environment to continue her schooling.

The federal government has for over 100 years exercised responsibility for the education of Indian children. Beginning with amendments to the *Indian Act* in the 1880s, the education of Indian children was a central part of several related government policies: to assimilate Indians into mainstream society, to remove them from their lands, to facilitate their extinction as a distinct people in Canada, to obliterate their cultures and to eradicate their languages. These policies were motivated by the belief that Aboriginal cultures were inferior and should be supplanted by European values. From the 1880s, the federal government actively engaged in a policy of forcing Indian children to move away from their homes to attend school.

By 1971, even the smallest Manitoba communities had long had their own schools. Yet, the federal government still maintained its policy of moving Indian children to larger communities to be educated.

The government made a conscious decision to transport Aboriginal children away from their communities rather than build suitable educational facilities there. This decision was a remnant of the traditional view of the Department of Indian Affairs that Aboriginal communities were neither viable nor desirable, and that any effort that appeared to encourage them to grow and become self-sustaining was to be avoided.

Early on, the government concluded that Aboriginal people would become extinct because the pressure on them to assimilate and give up their "Indianness" was viewed as being overpowering and irresistible. Their demise as a people was considered inevitable. The federal policy was not simply to let it happen, but to make it happen.

Removing Aboriginal children from the influence of their parents and their cultures to "educate" them to the "whiteman's ways" was an important part of "making it happen." The actions of the government in doing so were clearly racist and discriminatory.

It was bad enough that Indian children were (and still are) required to move away from home simply to get an education. But what made the situation worse was that the services provided to these children were inferior. Social, recreational and professional supports were inadequate, and the government failed to ensure that the children's living environments were safe and culturally appropriate. As a result of Indian Affairs policies, many lives were scarred by sexual and physical abuse as well as less overt forms of mistreatment and neglect.

The racist attitudes and actions inherent in a century of departmental policy were reflected in Indian Affairs' treatment of young Aboriginal people in its care in The Pas, both before and after the death of Betty Osborne:

- The Department of Indian Affairs failed to protect their wards from the practices of cruising, assault and abuse. It failed to seek the cooperation of the schools to protect the Aboriginal students.
- The department also failed to address adequately the problems of segregation and harassment facing students attending school in The Pas. Nor did it inform their parents of those problems.
- The department failed to inform the students' parents of what was for many a traumatic experience: the vicious murder of one of their friends.

- The department failed to protect the legal interests of Indian students under their care from police mistreatment during the course of the investigation. Several young Aboriginal people were subject to intense police questioning without adequate protection of their legal and civil rights. Their parents were not informed.
- The department failed to provide suitable professional counselling for Indian students who were affected by Osborne's murder and by the manner in which they were questioned by the police.

In our view the failure of Indian Affairs department officials to act borders on negligence. Although such treatment was consistent with a century of government indifference and insensitivity, it was nonetheless racist.

Other Instances of Racism

We have concluded that there were several other instances of conscious racism in various aspects of the Osborne case:

- The murder of Betty Osborne clearly was motivated by racism.
- The manner in which the police pursued their initial investigation by rounding up and questioning only Aboriginal students was motivated, at least in part, by race.
- The RCMP failed to obtain consent from the parents of Aboriginal students they intended to question. Nor did the police inform parents after the students had been questioned. This was discriminatory in light of the courtesies shown to the families of Colgan and Houghton.
- The manner in which people were brought to the morgue to view the victim's body, and the use of photographs of her, showed lack of respect for the deceased. It would appear that because the victim was Aboriginal, the police believed that no one would object to such treatment. This amounted to racism.
- The RCMP failure to check the Colgan car properly and the police's deferential treatment of the Colgan family appear to have been based on the Colgans' race and community status. This was discriminatory.
- The mistreatment of Annaliese Dumas and Cornelius Sighetty was discriminatory. Both were treated as potential suspects, and were subjected to indignities to which none of the non-Aboriginal witnesses or suspects was subjected.
- The refusal to come forward of some of the people who had actual information and evidence about what occurred on the night of November 12, 1971 undoubtedly was motivated in part by the fact that the victim was an Indian woman.

- The systematic removal of potential Aboriginal jurors from the jury panel was motivated by their being Aboriginal persons. The jury selection process permitted racism to be applied.

Did Racism Cause Delay?

It is not difficult to identify individual acts of racism associated with the Osborne case. However, it is more problematic to determine whether other aspects of the RCMP investigation were affected by racism; in particular, whether the delay in bringing the assailants to trial was caused even partially by the Aboriginal status of the victim.

As we have already concluded, certain specific acts that occurred during the course of the investigation happened because of the discriminatory attitudes or prejudices of some of the police officers involved.

However, questions remain about the long delay in bringing charges against the assailants. From the fall of 1972 until 1983, when Constable Urbanoski took over the case, little if any progress was made in building the case against the culprits, whose identity had long been known. Was that delay attributable to the failure of anyone to pursue the case because of the Aboriginal status of Betty Osborne?

It is virtually impossible for us to answer that question with absolute certainty, because we would have to know the motivation and attitudes of every officer who handled the file during that time, and we do not. But from what we know about that period and about prevailing RCMP practices, we are satisfied that the delay itself and the RCMP role in contributing to the delay were not attributable to racism on the part of the force or any individual within the force.

At the time of our hearings into the Osborne matter in 1989, Manitoba had a number of murders which had not been solved officially. These murders involved both Aboriginal and non-Aboriginal victims. What is startling is that in many of those cases the police believed that they knew who committed the crime, but were unable to gather the necessary evidence against the suspect to proceed with charges. Officially, therefore, the crime was considered unsolved since no charge could be laid due to lack of sufficient evidence, but, unofficially, the case was solved in one major respect: the police knew who did it. They just couldn't prove it.

In the period between 1970–72, in addition to the killing of Betty Osborne, six other murders occurred in The Pas area. All were cleared up to the extent that charges were laid. The Osborne murder was the only one which went unsolved. That fact alone, however, does not convince us that the case was treated differently on account of the race of the victim.

By the late summer of 1972, the RCMP were aware that Colgan, Manger, Houghton and Johnston were with Betty Osborne at the time of her death, that all or some of them were directly responsible for the killing, that all of them knew what had happened and that each potentially had evidence that could solve the case. It was obvious from what was known then or shortly thereafter that the four had established a pact of silence among themselves.

It also became obvious during the course of the evidence before us that, at least among three of the suspects, the pact of silence remained strong for many years. Colgan broke ranks when faced with a murder charge but the others have held steadfast to their pact.

There are several aspects of the case which the RCMP should have handled better, and there is no excuse for the discriminatory and insensitive treatment which some Aboriginal people received at the hands of the police. Nevertheless, we are satisfied that any delay caused by the RCMP in bringing the matter to trial was not caused by racism on the part of the RCMP or any member of the RCMP.

Racism and the Silence

Many residents of The Pas in 1971 and thereafter did not like police officers. Former RCMP constable Robert Flake, who is now a lawyer practising in Ontario, testified that there was little cooperation extended to police by the townspeople in any of the cases under police investigation. This resulted in a difficulty in developing informants and led to other impediments to crime-solving. Generally, he stated, residents of The Pas simply did not want to get involved in any police matter and, in his opinion, the Osborne matter was no different. Sadly, this attitude is not unique.

Only a handful of people in The Pas had any direct knowledge that could be used as evidence against any of the suspects. From the evidence before us, we are convinced that only those close to the four abductors—friends and family—had any knowledge that could be considered admissible against them in a court of law.

A number of people undoubtedly would have heard second-hand stories about what the suspects said to others, but such evidence would have been hearsay and as such inadmissible as evidence in court. Other than those people, however, the vast majority of the general population would have heard no more than gossip and rumour—nothing even remotely approaching what could be called evidence usable in a court of law.

We are satisfied, however, that many people knew that the police had reached the conclusion that Manger, Houghton, Colgan and Johnston were the culprits. To any inquisitive person, at least if he or she were non-Aboriginal, the identities of those whom the police believed did the murder was so widely known after the fall of 1972 that it was simply a matter of asking a few people around town if one wanted to find out. Many people in town knew that the police "knew" who did it, and townspeople knew the names of the suspects—but beyond that they knew little else.

The people who had actual and real knowledge admissible against the accused failed to come forward with that evidence to the RCMP for a variety of reasons, not all of which were racist. Some, for example, clearly feared for their lives or safety. Some also simply did not want to get involved.

The attitude prevailing in the community of The Pas at the time, concerning Aboriginal people, causes us to conclude that racism was the motive for many to remain silent, particularly those who regularly associated with the suspects.

For example, of all the people at the party where Dwayne Johnston referred to the killing, only one person came forward. The others remained silent or refused to give information to the police.

We believe that for some people who have direct and admissible evidence, the Aboriginal status of Betty Osborne was and still is a factor in their silence. Such people are unwilling or unprepared to come forward to assist in solving the murder of any Indian woman. It is with great regret that we report that we are unable to state, with certainty, exactly who they are.

We are left with one last curious issue: Why was there no outcry from the general population to bring the four to justice? Was that failure racially motivated? Again, with few exceptions, we are unable to answer with absolute certainty. But we are able to reach some conclusions about that. The fact that people in The Pas did not cooperate actively with police generally, helps to explain why people were not clamouring for the arrest of the suspects. It is also quite possible that the lack of a public outcry stemmed from a general unwillingness to "get involved."

It may be that Betty Osborne's status as an outsider contributed to that silence. Chief Oscar Lathlin felt as much. In this regard, we note that the Aboriginal community of The Pas was just as silent as the non-Aboriginal community in demanding a resolution to the case.

It is possible that, as Rebecca Ross suggested, Betty Osborne's gender played a role in that silence. Because of the northern, brawling, almost frontier-like atmosphere which prevailed in The Pas at the time, we have no difficulty in concluding that it probably did. Silence that was motivated by the fact that Betty Osborne was a woman is as insidious as any silence motivated by racism.

It is our opinion that the separation of the two communities in The Pas had a negative effect on the investigation. We think that the separation fed a lack of concern for the Aboriginal peoples on the part of the non-Aboriginal community. In this uncaring atmosphere, some of those who heard the rumours, and perhaps the confessions, simply were able to ignore Osborne's suffering and forget what they had heard.

A most telling and honest comment was that of Sheriff Gerald Wilson's, when asked if he would have gone to the police earlier with the information Colgan gave him, if the victim had been the daughter of a neighbour. He said he probably would.

To the people of The Pas, Osborne was not the girl next door; she was Aboriginal in a white town. Even though she had lived in The Pas for two years by the time she was murdered, she was a stranger to the community, a person almost without identity. She was unknown to those who heard the rumours. Because of the racial separation of The Pas, those who cared about Betty Osborne, her Aboriginal friends, were not privy to the rumours about those who took her life.

CHAPTER 10

CONCLUSIONS

We realize, of course, that much has changed in the years since Betty Osborne's life was taken in 1971. The segregation in the school lunch-room, the bars and the movie theatre has, we understand, ended. Still, much more must be done.

If the two communities make a real and concerted effort to eradicate the separation, things will inevitably improve. The non-Aboriginal community must learn to respect Aboriginal people and their culture. Instead of looking at the Aboriginal people only as consumers, the business community should be offering them employment in stores and businesses. It is surprising even to see how few Aboriginal people are employed in the shopping mall located on the reserve. If Aboriginal people are to become self-sufficient, those in control of business have to make a greater effort to provide them with an opportunity to work. Government may have to take the lead by employing greater numbers of Aboriginal people in all government offices. We believe that quotas should be used so that Aboriginal people receive preference in employment until the numbers employed are representative of the numbers living in a community. Not only could the provincial government do this in its own offices, but it could require the same policy be followed by all Crown agencies and by all companies with which it does business.

The pervasive separation and discrimination that existed in The Pas in 1971 shows the need for increasing the involvement of the Aboriginal peoples in the institutions of mainstream Canada. Would the case have come more quickly to a conclusion if

more Aboriginal persons were in the police? Or in the Crown Prosecutor's office? Of course, we have no way of knowing and it is pointless to speculate. But it is a fact that it was the special effort made by Constable Urbanoski which brought those involved to court. This may be due in part to changes in police practice. It is only recently that the police have resorted to the use of newspaper advertisements and television shows such as "Crime Stoppers." But it is also possible that, had there been Aboriginal persons involved in the investigation and prosecution, the necessary extra effort might have been forthcoming earlier. We do not know if that is so. We cannot know. We believe that only if the justice system employs more Aboriginal persons will such questions be avoided in the future. Until it does, such doubts and suspicions will continue to arise. It is an inescapable fact that the Osborne case demonstrates that the justice system must employ many more Aboriginal persons. And it must do so immediately. In the other volume of our report we discuss more specifically how this process might begin.

It is clear that Betty Osborne would not have been killed if she had not been Aboriginal. The four men who took her to her death from the streets of The Pas that night had gone looking for an Aboriginal girl with whom to "party." They found Betty Osborne. When she refused to party she was driven out of town and murdered. Those who abducted her showed a total lack of regard for her person or her rights as an individual. Those who stood by while the physical assault took place, while sexual advances were made and while she was being beaten to death showed their own racism, sexism and indifference. Those who knew the story and remained silent must share their guilt.

APPENDIX I

1. Witnesses at the Osborne Hearings in Order of Appearance

Name	Date of Appearance
Urbanoski, Const. Robert Neil	June 19, 1989 & August 9, 1989
Martel, Robert Thomas	June 20, 1989 & September 18, 1989
Stovern, Leon Wayne	June 20, 1989
Lyons, Sgt. John Robert	June 20, 1989
Fitzmaurice, John Thomas	June 20, 1989
Knight, Donald Ray	June 21, 1989
Grosenick, Larry Leroy	June 21, 1989 & June 23, 1989
Osborne, Justine	June 22, 1989
Ayers, Robert Louis	June 22, 1989
Bielert, Harold Herbert	June 22, 1989
Cassidy, Insp. Michael John	June 22, 1989
Bighetty, Cornelius	June 23, 1989
Dumas, Annaliese	June 23, 1989
Dangerfield, Jeremy George Bob	June 26, 1989
Nozick, Stanley Sheldon	June 26, 1989
Garson, Allan Graeme Stuart	June 26, 1989
Flake, Robert Frederick	June 27, 1989
Colgan, Lee Scott	June 27, 1989 & June 28, 1989
Manger, Norman Bernard	June 28, 1989
Phillips, Katherine Eileen	June 28, 1989
Demmings, Arlene Linda	June 29, 1989
Dick, Catherine Eleanor	June 29, 1989
Wilson, Gerald Douglas	June 29, 1989 & August 4, 1989
Unidentified Witness #1	June 29, 1989
Duncan, Keith Arnold	July 31, 1989
Stewart, S/Sgt. Denys Allister	July 31, 1989
Koppang, Charles Karl	July 31, 1989
Moorlag, Insp. Hendrik Kornelius	July 31, 1989
Fishman, Arthur	August 1, 1989
Priest, Lisa Marie	August 1, 1989
Ross, George	August 2, 1989
Ross, Rebecca Ann	August 2, 1989

Carlson, S/Sgt. Eric Elymer	August 2, 1989
Boyle, Const. Thomas Francis	August 2, 1989
MacPherson, Archibald MacDonald	August 2, 1989
Brownlee, Dennis	August 2, 1989
Young, Joseph Albert	August 3, 1989
Halliday, Jack Henry	August 3, 1989
Brimacombe, Lloyd	August 3, 1989
Brimacombe, Elsie Mae	August 3, 1989
Funk, Nelson William	August 3, 1989
Benson, William James	August 3, 1989
Unidentified Witness #2	August 4, 1989
Kujawa, Serge	August 4, 1989
Geddes, Insp. Alexander Murray	August 4, 1989
Mayer, Robert Alfred	August 8, 1989
Hayden-Luck, Alan George Robert	August 8, 1989
Butler, Claudia	August 8, 1989
Apetagon, Byron	August 8, 1989
Simpson, Eva	August 9, 1989
Lathlin, Chief Oscar	August 9, 1989
Scurfield, John Morgan	August 10, 1989
Johnston, Dwayne Archie	August 10, 1989
Houghton, James Robert Paul	August 31, 1989

2. Witnesses by Alphabetical Order

Name	Date of Appearance
Apetagon, Byron	August 8, 1989
Ayers, Robert Louis	June 22, 1989
Benson, William James	August 3, 1989
Bielert, Harold Herbert	June 22, 1989
Bighetty, Cornelius	June 23, 1989
Boyle, Const. Thomas Francis	August 2, 1989
Brimacombe, Elsie Mae	August 3, 1989
Brimacombe, Lloyd	August 3, 1989
Brownlee, Dennis	August 2, 1989
Butler, Claudia	August 8, 1989
Carlson, S/Sgt. Eric Elymer	August 2, 1989
Cassidy, Insp. Michael John	June 22, 1989
Colgan, Lee Scott	June 27, 1989 & June 28, 1989
Dangerfield, Jeremy George Bob	June 26, 1989
Demmings, Arlene Linda	June 29, 1989

Appendix 1

Dick, Catherine	June 29, 1989
Dumas, Annaliese	June 23, 1989
Duncan, Keith Arnold	July 31, 1989
Fishman, Arthur	August 1, 1989
Fitzmaurice, John Thomas	June 20, 1989
Flake, Robert Frederick	June 27, 1989
Funk, Nelson William	August 3, 1989
Garson, Allan Graeme Stuart	June 26, 1989
Geddes, Insp. Alexander Murray	August 4, 1989
Grosenick, Larry Leroy	June 21, 1989 & June 23, 1989
Halliday, Jack Henry	August 3, 1989
Hayden-Luck, Alan George Robert	August 8, 1989
Houghton, James Robert Paul	August 31, 1989
Johnston, Dwayne Archie	August 10, 1989
Knight, Donald Ray	June 21, 1989
Koppang, Charles Karl	July 31, 1989
Kujawa, Serge	August 4, 1989
Lathlin, Chief Oscar	August 9, 1989
Lyons, Sgt. John Robert	June 20, 1989
MacPherson, Archibald MacDonald	August 2, 1989
Manger, Norman Bernard	June 28, 1989
Martel, Robert Thomas	June 20, 1989 & September 18, 1989
Mayer, Robert Alfred	August 8, 1989
Moorlag, Insp. Hendrik Kornelius	July 31, 1989
Nozick, Stanley Sheldon	June 26, 1989
Osborne, Justine	June 22, 1989
Phillips, Katherine Eileen	June 28, 1989
Priest, Lisa Marie	August 1, 1989
Ross, George	August 2, 1989
Ross, Rebecca Ann	August 2, 1989
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Simpson, Eva	August 9, 1989
Stewart, S/Sgt. Denys Allister	July 31, 1989
Stovern, Leon Wayne	June 20, 1989
Unidentified Witness #1	June 29, 1989
Unidentified Witness #2	August 4, 1989
Urbanoski, Const. Robert Neil	June 19, 1989 & August 9, 1989
Wilson, Gerald Douglas	June 29, 1989 & August 4, 1989
Young, Joseph Albert	August 3, 1989

Appendix II

Exhibits at the Osborne Hearings

1. Rules of procedures for Aboriginal Justice Inquiry, Helen Betty Osborne hearing, June 14, 1989
2. Area Layout, Clearwater Lake area
3. Area Layout, pump house area
4. Const. Donald Ray Knight's description of murder scene (two pages)
5. Booklet of photographs of murder scene (34 pages)
6. Copy of Medical Examiner's Report
7. Letter to Deputy Attorney General Gordon Pilkey from H. B. Luross, C/Supt., RCMP date December 8, 1971, re: possible reward
8. Letter from Deputy Attorney General Gordon Pilkey, re: refusing to offer reward
9. Anonymous letter, May 3, 1972 (typed copy)
10. Copy of RCMP Information Circular, November 16, 1971, re: The Pas detachment's request for assistance/information in identifying assailant(s) and suspect vehicle
11. Copy of RCMP Information Circular, November 24, 1971, re: a thorough search of any suspect vehicles and tools for blood stains
12. Copy of RCMP letter, November 26, 1971, re: information request of anyone requiring treatment for puncture wounds, as assailant(s) may have suffered injury
13. Copy of RCMP Information Circular, December 6, 1971, re: photos depicting the two screwdrivers found near the scene
14. Copy of RCMP Information Circular, November 29, 1971, re: cooperation of the Manitoba College of Physicians and Surgeons
15. List of RCMP members who worked on the case in The Pas
16. Bundle of letters from D'Arcy Bancroft, lawyer for four suspects and two witnesses
17. Memo from Const. John Lyons
18. Copy of statement of Norman Bernard Manger
19. Copy of Sgt. Larry Grosenick's notes, 1972
20. Hand-drawn diagram of scene by Cpl. Harold Bielert
21. Hand-drawn diagram of scene by Cpl. Bielert
22. Copy of Cornelius Bighetty's statement to the police
23. Copy of letter dated March 10, 1987, immunity for Lee Colgan
24. Copy of memo dated Nov. 1, 1972 from Stanley S. Nozick, Crown attorney, Crown's assessment of the case
25. RCMP Occurrence report from Sgt. Alan Hayden-Luck dated July 3, 1972, re: Osborne's clothes
26. Memorandum and paper on immunity

27. Statement from Norman Manger to RCMP dated Nov. 11, 1987 taken by Const. Bob Urbanoski
28. Statement from Norman Manger to RCMP dated September 26, 1972
29. Consent to take polygraph by Manger, September 23, 1972
30. Photograph of anonymous letter (see Exhibit #9)
31. Memo dated December 9, 1987 to M. Bruce, Assistant Deputy Minister, from A.J. Nielsen, Chief Sheriff, re: Sheriff Wilson
32. Memo re: Sheriff Wilson, January 18, 1988
33. Statement of Sheriff Wilson, April 2, 1986 (typed)
34. Statement of Sheriff Wilson, April 2, 1986 (handwritten)
35. Arbitration of Gerald Wilson's grievance
36. Statement of unidentified witness to RCMP (handwritten)
37. Photograph of Betty Osborne submitted by RCMP
38. List of persons interviewed by Cpl. K.A. Duncan, RCMP, November 27, 1971 – December 12, 1971
39. Pocket book, *Conspiracy of Silence* by Lisa Priest
40. Statements of George Ross, November 14, 1971
41. Statement of Rebecca Ross, November 23, 1971
42. School yearbook, M. Barbour Collegiate, 1970
43. Notes of Const. T. F. Boyle, Nov. 13–25, 1971
44. Subpoena for unidentified witness
45. Jury selection documents
46. Jack Halliday's withdrawal of offer to take polygraph
47. Report prepared by Constable Urbanoski for the AJI, 1989
48. Colgan's letter changing his testimony
49. Transcript of the Preliminary Inquiry, July 6,7 and 8, 1987
50. Transcript of the Trial, November 23 – December 1, 1987
51. Phone records for the Colgan residence and cottage, and Halliday residence for September – December 1987
52. Summary of Autopsy by Dr. D. W. Penner, Pathologist, Health Sciences Centre
53. RCMP Memo dated December 5, 1985, re: laying charges
54. Colgan's diary for his lawyer, October 15, 1986
55. Colgan's statement, March 10, 1987
56. Colgan's statement, April 20, 1987
57. Unused exhibit number
58. Letter from Sheriff, re: jury, August 15, 1989
59. Letter from George Dangerfield, re: laying other charges after murder acquitted
60. Letter and memo from M. Barbour Collegiate, September 1, 1989

APPENDIX III

Decision on the application made by Dwayne Archie Johnston on June 19, 1989 for standing at hearings into matters surrounding the death of Helen Betty Osborne:

COMMISIONER A.C. HAMILTON: Dwayne Archie Johnston, who was convicted for the murder of Helen Betty Osborne, through his counsel, Mr. Robert Harper, seeks standing in these proceedings. He wishes to have full standing.

The interest of Mr. Johnston in the proceeding, as stated by his counsel, is to look at all aspects of the police investigation to determine whether the right persons were charged; to determine whether the appropriate charges were laid; to determine why they were not laid earlier; to determine why immunity was granted; and whether the prosecution was properly conducted.

We are not persuaded that Mr. Johnston has any substantial or direct interest in the answer to any of these questions.

As we stated at an earlier standing hearing, we are satisfied that the applicable criteria to guide us in determining whether or not to grant full or limited standing to any group or individual is set out in *Re: Royal Commission on the Northern Environment* (1983), 144 D. L. R. (3rd), p. 416, where the Ontario High Court said at page 418:

> The persons entitled to full participation are only those who have a substantial and direct interest, not just anyone who has a mere academic interest which is neither substantial nor direct.

It is not enough merely to be interested as any other member of the public in this Inquiry.

At the same time that he is expressing his interest in these proceedings, Mr. Johnston, through his counsel, says that he has no intention to have Mr. Johnston called as a witness and Mr. Johnston does not want to appear voluntarily. He does not, therefore, fall into the other category of persons who, because of information they can or wish to provide, fall into the category of those with a substantial and direct interest in a proceeding.

We conclude, then, that it is impossible to say that Mr. Johnston has a substantial and direct interest in the proceedings. Nor can it be said, as stated in the *Northern Environment* case, that the outcome of the Inquiry may seriously affect him.

The application for standing is therefore denied.

APPENDIX IV

Rules of procedure used during the public hearings into the Osborne matter.

1. All evidence will be presented by viva voce testimony and the filing of relevant, admissible exhibits;
2. When the viva voce evidence deals with opinion, general attitudes or impressions, the strict rules of evidence will not apply;
3. When the rights or liability of any individual might be affected, the usual rules of evidence will be applied;
4. All witnesses will be called and examined by Commission counsel;
5. If counsel representing groups or individuals granted full or limited standing wish a witness to testify, then that counsel will request Commission counsel to call the witness;
6. If Commission counsel calls such a witness at the request of counsel for a group or individual, that witness will be examined by Commission counsel and thereafter may be cross-examined by all other counsel granted full standing;
7. If Commission counsel decline to call a witness at the request of counsel for a group or individual, that decision may be subject to review by the Commissioners;
8. All witnesses may be re-examined by Commission counsel;
9. Any witness called to testify before the Commission is entitled to be represented by counsel while testifying, but counsel for that witness may not necessarily be permitted to cross-examine or otherwise question that witness or any other witness;
10. Some counsel may be granted full standing and will be entitled to cross-examine all witnesses and make full argument;
11. Other counsel or parties may be granted limited standing and be entitled to deal with limited issues, or be entitled to argument only;
12. If a number of individuals or organizations apply for standing, and the interests of several appear similar, standing may be granted to more than one of those individuals or organizations, but subject to the requirement of representation by one counsel who will be entitled to participate fully, or on a limited basis, as the Commissioners may direct;
13. In the event the matter of *Regina vs. Dwayne Archie Johnston* is still pending before any court, the hearing in respect of Helen Betty Osborne will be postponed pending the final determination of that case.

THE DEATH OF JOHN JOSEPH HARPER

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CHAPTER 1

INTRODUCTION

The Events

On March 9, 1988 John Joseph Harper died from a gunshot wound caused by the firearm of Const. Robert Andrew Cross of the Winnipeg Police Department.

The next day, March 10, the City of Winnipeg Police Department's Firearms Board of Enquiry met and reviewed the circumstances surrounding the death of Harper, and concluded that there was no wrongdoing on the part of Cross. The board found that his conduct was above reproach and that the incident had been precipitated by an assault against Cross by Harper. The board concluded from the evidence of Constable Cross that there had been a struggle for Cross' service revolver between Harper and Cross, and that the gun had discharged accidentally, killing Harper.

That afternoon Chief Herb Stephen called a press conference to announce that the board had exonerated Cross and to say that a senior Crown attorney had decided that there would be no charges laid against the officer.

On March 11, 1988 an inquest into Harper's death was directed pursuant to section 9(3)(b) of *The Fatality Inquiries Act* (R.S.M. 1987). On March 24, 1988 Harry Wood, the brother of J.J. Harper, filed a complaint against Cross with the Law Enforcement Review Agency. On April 5, 1988 Provincial Court Judge John Enns convened the inquest which lasted 12 days and concluded on April 20. At the outset Judge Enns granted standing to Harper's family, the Winnipeg Police Association, Cross and the

City of Winnipeg. Fifty-four witnesses testified at the inquest where, in accordance with existing practice, the evidence was called by a Crown attorney, in this case, William Morton Q.C.

On May 26, 1988, pursuant to section 20(1) of the *The Fatality Inquiries Act*, Judge Enns issued his written report on the inquest, stating:

> In conclusion, despite certain shortcomings in the area of police investigation, it is my view that the shooting occurred as a result of the deceased pushing down the officer and then attempting to take his revolver. The officer's attempt to keep control of his gun is justified and the ensuing shooting I find to be accidental. I therefore exonerate Constable Cross. (Exhibit 3, p. 22)

The Public Inquiry into the Administration of Justice and Aboriginal People was established pursuant to Orders-in-Council dated April 13, 1988 and November 2, 1988 (passed in English only), and by subsequent special legislation. We were appointed as Commissioners to examine how Manitoba's Aboriginal peoples are being treated by the justice system. In addition, we were asked to examine all matters surrounding the deaths of John Joseph Harper and Helen Betty Osborne.

The Mandate of the Inquiry

The mandate of the Inquiry is set out in *An Act to Establish and Validate the Public Inquiry into the Administration of Justice and Aboriginal People* (S.M. 1989–90, cap. 1). Section 7 of the Act states in part:

> [The Commission and Commissioners]
>
> (a) is and are declared to have the right to investigate all aspects of the events leading up to the death of J.J. Harper, the investigation which was conducted by the City of Winnipeg Police Department after the death of J.J. Harper, announcements made by the City of Winnipeg Police Department and the appropriateness of those announcements, the training and regulations of the City of Winnipeg Police Department relating to stopping persons on the street, the arrest of persons, the use and protection of firearms and the manner of dealing with Aboriginal people, whether there exists any evidence of racial prejudice with respect to any of the events which led to the death of J.J. Harper or the investigation of his death, the adequacy of procedures for inquiry into the death of persons whose deaths occurred while in contact with the police and all matters on which evidence was led and findings made at the inquest which was conducted into the death of J.J. Harper pursuant to the provisions of The Fatality Inquiries Act;...
>
> (c) is and are declared to have the right upon completion of the inquiry and the making of its report to make such findings of fact as it deems appropriate, and, where it deems proper, to name the

names of persons whose conduct ought, in the opinion of the commissioners, to be called into question; and

(d) may convene a special hearing or hearings to compel the production of documents which, in the opinion of the commissioners, are deemed relevant directly or indirectly to matters before the commission or to the credibility of any person.

After public notice, we convened a special hearing on December 20, 1988 to determine the parties to be accorded standing to participate in the hearings. We also issued a preliminary set of procedural rules. (See Appendix III) We ordered that full standing be accorded to the Winnipeg Police Association and its members, including Constable Cross and the other officers involved in the events of the night of the Harper shooting, the City of Winnipeg, the family of the late J.J. Harper, and the Island Lake Tribal Council as representatives of Manitoba's Aboriginal population. Counsel acting for the parties were: A.R. McGregor Q.C. and Marty Minuk, for the Police Association; Doug Abra, for the City of Winnipeg; Harvey Pollock Q.C. and Martin Pollock, for the Harper family; and Hersch Wolch Q.C., for the Island Lake Tribal Council. Commission counsel were Perry Schulman Q.C. and Randy McNicol Q.C.

The Manitoba *Evidence Act* (cap. E 150, C.C.S.M.) provides that a party may request an inquiry to state a case to the Court of Appeal. In April 1989, the police association asked us to state a case to determine our authority to examine the J.J. Harper matter.

On May 1, 1989 we stated a case to the Court of Appeal. On May 4, 1989 the Honourable A.M. Monnin, Chief Justice of Manitoba, ordered that all investigations and matters relating to the Harper hearings be suspended until the stated case could be heard. The stated case was heard on June 8, 1989 and judgment was delivered on that day. The Court of Appeal decided that the Orders-in-Council establishing the Inquiry were invalid because they were passed in English only.

The government then introduced an Act re-establishing the Inquiry and confirming the Inquiry's past actions. *An Act to Establish and Validate the Public Inquiry into the Administration of Justice and Aboriginal People* was adopted unanimously by the Manitoba Legislature and became law on June 14, 1989.

After the passage of the Act, subpoenas were issued to several officers of the City of Winnipeg Police Department, calling upon them to produce notebooks used in the investigation into the death of J.J. Harper, including all notebooks containing entries about the Harper shooting and the books immediately preceding and following those books.

The Chief and the City of Winnipeg Police Department took the position that the notebooks were beyond their control since the notebooks were in the possession of the individual officers. Subpoenas then were issued to the individual officers, requiring that they produce the notebooks at a special hearing to be held in the afternoon of June 30, 1989. The police association challenged our authority to do so.

The association asked that the Commission state another case on the question of the jurisdiction of the Inquiry under the new Act and on the question of the notebooks.

We held a special hearing to consider the Winnipeg Police Association request on July 7, 1989. As a result, we stated a second case to the Court of Appeal. The questions considered on July 27, 1989 and the answers given by the Court of Appeal were as follows:

1. Are we as commissioners entitled to determine whether any named individual is civilly or criminally responsible for any act or omission we may conclude he or she may have committed?

Answer: No, but the Commissioners may make findings of fact and name the names of persons whose conduct they consider should be called into question.

2. Does the Commission's constituent statute, in whole or in part, or any procedures required or authorized thereunder, violate and infringe individual rights and freedoms embodied in the common law, or various Acts of either level of government, including the Canada Evidence Act and the Canadian Charter of Rights and Freedoms?

Answer: No.

3. Is Constable Robert Cross a compellable witness at the hearings to be conducted into the Harper matter?

Answer: Yes, but when testifying he is entitled to assert the common law privilege against self-incrimination in respect of any question posed of him.

4. Were we correct in ordering certain City of Winnipeg police officers to produce their notebooks relating to the investigation into the shooting and death of John Joseph Harper as well as their notebooks preceding and following the Harper notebooks?

Answer: No, but the Commissioners were correct in ordering production of photocopies of the portions of notebooks relating to the Harper matter, with verification of the authenticity as carried out by Martin Minuk, one of the solicitors for the Respondent [Police] Association.

5. Are the Commissioners disqualified in law from conducting any and all investigations contemplated by section 7(a) of the said Act by reason of a reasonable concern of predisposition or other reasonable apprehension of bias?

Answer: No.

On August 21, 1989 we began hearing testimony from witnesses and receiving evidence on the Harper matter. The hearings continued through August 22–25, 28–30, September 1, 11–13, 18–20 and November 6–8, with final submissions being made by counsel for all parties on November 15, 1989. For a list of witnesses and exhibits see Appendices I and II.

CHAPTER 2

THE SEQUENCE OF EVENTS

The Activities of J.J. Harper

John Joseph Harper, a member of the Wasagamack Indian Band in the Island Lake area, was executive director of the Island Lake Tribal Council and a leader in Manitoba's Aboriginal community. He and his wife Lois had three children. At the time of his death he was 37 years old, had short black hair and wore glasses. He was six feet tall and weighed 185 pounds.

At approximately 8:00 p.m. on the evening of March 8, 1988, Harper, wearing a black cloth jacket, blue jeans and brown cowboy boots, went to the St. Regis Hotel on Smith Street in Winnipeg. At the hotel he spent time drinking with friends, including Joseph Wood, Allan Roulette and Raymond Swan. Later, they were joined by Kathy Bushie, Joyce Williams and Tanya Sinclair. Harper was drinking a mixture of brandy and coffee. At about 10:30 p.m., Harper and some of the others left the St. Regis for the Westbrook Hotel on Keewatin Street in the west end of the city. While he was there, he played pool and drank some more. The evidence is not clear as to how much he drank at the Westbrook but he had at least one beer. When the hotel bar closed, Harper and others went next door to a lounge known as DJ's, where they spent about another hour. Harper talked with other patrons and danced with Bushie, who observed Harper consume at least one more beer. When the lounge closed at 2:00 a.m., everyone left for home.

It is clear that Harper drank to excess that evening. His blood alcohol level at the time of his death at 3:30 a.m. was .22, almost three times the level of legal impairment

for drivers. Bill Pryor and Carol Sever, employees of DJ's, testified that Harper had been acting aggressively that evening. Sever testified that Harper was "spoiling for a fight." Pryor stated that he had to escort Harper out of the bar. Sandra Harrop, another bar employee, could not recall anything unusual. Bushie and Wood, on the other hand, testified that Harper had not been in a belligerent mood and that he had left the bar on his own without assistance.

Harper did have a history of alcohol consumption. Chief Medical Examiner Dr. Peter Markesteyn concluded that Harper likely could consume quite large amounts of alcohol without appearing to be as impaired as someone who did not have a similar history of alcohol consumption.

When they left DJ's Kathy Bushie offered Harper a ride home and he accepted. Outside the lounge, however, Harper changed his mind and asked her to accompany him in a taxi. She declined and repeated her offer of a ride, which he refused. At that point, Harper walked away in the direction of his home on Elgin Avenue. The time was shortly after 2:00 a.m.

The Car Chase

At around midnight on March 8, a white Dodge Aries, licence plate 244 EKS, was stolen from the parking lot of the Westbrook Hotel by a young Aboriginal male named Melvin Pruden. Pruden was wearing a dark grey, waist-length cloth jacket and light acid-washed jeans, black running shoes, a red shirt and gloves.

Pruden was 19 years of age at the time, 5'9" and weighed 155 pounds. He was a member of the Little Saskatchewan Indian Band of the Interlake region of Manitoba and had been raised there before coming to Winnipeg. He had a grade 11 education and was unemployed. On the night of March 8, he was with his friend Allan and one other individual. Allan was aged 13—a youth as defined in the *Young Offenders Act* (S.C. 1980–81–82–83, c.110), who should not be identified by us.

Pruden observed the Aries with its motor running. On impulse he decided to kick in the driver's window and drive away with the car. While Pruden was breaking into the car, Allan and the other person continued walking down the street. Pruden stopped the car on Alexander Avenue near the Westbrook and asked Allan to get in. He did, and he and Pruden began to drive around. The car was reported stolen almost immediately.

Allan and Pruden went "joy riding" but did not go far in the two hours that passed before the police spotted them. At one point Pruden even returned to the Westbrook to purchase beer. They still were cruising in the vicinity of the Westbrook when they were sighted by Const. Robert Cross and Const. Kathryn Hodgins.

Constables Cross and Hodgins had been partners for about three years by March 8, 1988. Hodgins was the senior of the two, having been a member of the force for about nine years at the time, compared to Cross' four. They were stationed at District 2 Police Station on Lyle Street. They had started their shift at 10:00 p.m. and were scheduled to complete it at 8:00 a.m. on March 9.

They were patrolling in the area of the Westbrook Hotel, having spent the early part of their shift on traffic patrol on Logan Avenue, near Keewatin Street. At around 2:00 a.m. they had issued a speeding ticket to a motorist in the vicinity of the Westbrook. Shortly thereafter, having heard earlier of the theft of the Aries on their radio, they observed the stolen vehicle and gave chase. Cross was driving and Hodgins was designated "the jumper"—the officer who would leave the vehicle should a foot chase occur. The car chase proceeded south on Keewatin to Elgin Avenue, east on Elgin to Worth Street, north on Worth to Alexander Avenue, and east on Alexander to Winks Street.

It had rained earlier in the evening, making the streets slightly icy, although they were free of snow. Possibly because the streets were icy, both vehicles proceeded at speeds of less than 60 kph. Pruden drove through several stop signs and at least one red light in his attempt to elude police. Both Cross and Hodgins testified that they could not see who was in the stolen vehicle.

While the chase was taking place, Hodgins broadcast particulars over the police radio network, including the fact that they were giving chase, the description of the vehicle, traffic violations that occurred, and their location and speed. She did not broadcast a description of the driver or any other person in the car while the chase was in progress. Several other patrol cars monitored the chase. Radio and supervisory personnel at the district stations and the Public Safety Building also heard what was happening. Pruden attempted to turn north from Alexander Avenue onto Winks Street but ran into a snowbank. He and Allan then abandoned the vehicle and fled on foot.

Cross and Hodgins were sufficiently far behind the stolen vehicle when it turned the corner at Winks that they did not actually see it hit the snowbank, but were close enough to see the driver and the passenger when they fled the vehicle. The officers followed the suspects, in the patrol car, into the lane west of Winks between Logan and Alexander until they disappeared between houses. Both officers still were unable to give a description, but they were able to discern that one suspect was shorter than the other. Hodgins broadcast a description of them as two males in dark clothing. The shorter one was seen discarding his jacket. Cross drove into the lane to a position about two houses west of the corner of Winks and Alexander, and jumped out of the police car.

The Arrest of the Youth

Although Cross was driving, he got out of the cruiser and gave chase as the suspects fled between houses on his side of the car. Hodgins backed the car out of the lane onto Winks Street and parked facing Alexander Avenue. She picked up the leather jacket discarded by the youth, checked the stolen car, turned off its motor and noted a case of beer in the car. She returned to the police car and waited for her partner.

Allan had run in a westerly direction down the lane between Alexander and Logan. He saw the policeman start to chase him. He ran through the yard of one of the houses. While crossing Alexander he looked over his shoulder, and saw the police officer slip on the icy street and fall. He heard him yell "stop" or "halt," and saw him reach to the back of his right hip. Allan stopped, believing that the officer was about to draw

his gun. In his testimony Cross denied any such intention. Nonetheless, it was the first of several allegations concerning the use of police firearms that night.

Cross caught the youth and took him to the cruiser. Hodgins remarked at the extreme youthfulness of Allan when she first observed him. She stated, "He appeared to me at that time to be possibly nine or ten years of age, dark clothing, dark hair as I had seen."

The questioning of Allan took place with the youth in the back seat of the car, Cross standing beside the passenger side rear door, with the door open, and Hodgins in the driver's seat.

While she and Cross questioned Allan, Hodgins made notes about what the youth said on a scratch pad rather than in her notebook. She told us that she subsequently lost those notes and had no idea where they were. This was the first of several problems involving police note-taking that occurred that night. Hodgins relayed some of the information she said she received from Allan to central dispatch over the radio and over the car's computer system, which communicated directly with the main police computer at the Public Safety Building. Hodgins reported that the remaining suspect was "Male, native, black jacket, blue jeans," and stated, "This male is apparently approximately 22 years old." This description is important because it formed the basis for the pursuit of Pruden and ostensibly for the later confrontation with Harper.

Allan testified that he told the officers he did not know what Pruden was wearing and gave them no description of Pruden's clothing. He gave only a nickname, "Manny," and the age of the driver as being "between 19 and 17." Hodgins broadcast the age as "22" in order, she stated, to provide a fixed figure for the description. Allan said that he did not give that age or description.

Cross moved the cruiser to face west down the lane between Logan and Alexander. There they waited and kept watch. Cross and Hodgins listened to the various radio conversations of the officers who were engaged in the search by then.

The Pursuit of Pruden

Const. William Isaac and his partner, Const. Randy Hampton, arrived on the scene after the search for the suspect had begun. Hampton got out of their patrol car at the intersection of Weston Street and the lane between Logan Avenue and Alexander Avenue, two blocks west of where Pruden and Allan had left the stolen car. Isaac continued to drive around the area, listening to radio transmissions.

Hampton watched the lane and saw a male cross some distance away, and assumed he was the suspect they were seeking. Constables Richard Poneira and Grant Eakin arrived, and were told of the male Hampton had spotted. The three officers agreed that Hampton would proceed on foot down the lane toward the male, while Poneira would proceed parallel to him on the south sidewalk of Logan. Cross and Hodgins' cruiser was still at the other end of the lane with the suspect between them and Hampton. Eakin positioned his cruiser at the lane facing north towards Logan on Blaine Street and watched Hampton.

After a few minutes Eakin saw Hampton gesturing from a point three or four houses down the lane and heard his radio transmissions. Eakin then drove to Logan and Blaine, where he observed a male walking east down the north side of Logan just west of Electa Street, towards the area where Pruden was. Eakin did not think that that person could be the suspect they were pursuing but he did note what the man was wearing. Eakin testified he could not be sure if the person was Aboriginal. He did not stop to question the man because other officers were calling for assistance in the pursuit. He believed that the male being pursued by Poneira and Hampton at that time was a different person and was the real suspect.

Hampton said he came upon Pruden standing in the lane but said nothing to him. Pruden testified that when he saw Hampton, the police officer was pointing his revolver at him. He stated that he heard Hampton say, "Stop or I'll shoot," or "Freeze or I'll shoot." Pruden started to run, believing that Hampton would not fire. He says he then observed Hampton lower his revolver.

Hampton, seeing Pruden run toward Logan Avenue between two houses, radioed Poneira that the suspect was heading his way. Pruden ran across Logan and through Stanley Knowles Park. Poneira chased him across Logan and through the park but Pruden outdistanced him.

Knowing he couldn't catch Pruden, Poneira broadcast details of the chase. Eakin heard Poneira's broadcast and drove to Electa Street and Gallagher Avenue.

In the meantime, Hampton had run west down the lane to Blaine Street, then north across Logan. He ran west down Logan toward a railroad crossing just west of Weston in order to see if anyone was crossing. Constable Isaac, who had been circling the area in his patrol car, was at the corner of Electa and Gallagher when he saw Pruden run toward him across Stanley Knowles Park. He backed his patrol car toward where Pruden would cross Gallagher. Poneira broadcast a description of the suspect as a native male, 5'9", slim build, wearing a grey jacket and jeans.

After running through the park, Pruden ran across Gallagher and, upon seeing Isaac's patrol car backing up along the street, ran between houses on the north side of Gallagher to the back lane. Isaac left the patrol car when Pruden was in the middle of Gallagher and gave chase on foot. Pruden ran up onto a rise or dike at the end of Electa and then doubled back and hid in a back yard. He was apprehended and arrested by Isaac in the back yard of 2037 Gallagher Avenue.

Poneira then arrived and shortly thereafter Eakin drove down the back lane to the point where Isaac and Poneira had Pruden in custody.

The Arrest of Pruden

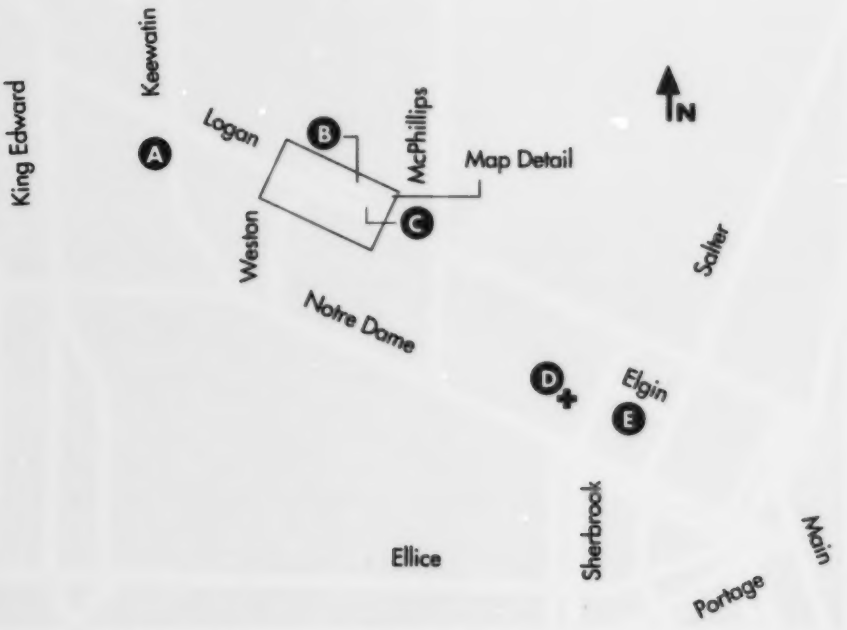
Pruden testified that he said to the officers, "Took you a while to catch me, eh?" a statement which he felt annoyed the officers. Pruden testified that one officer then grabbed and handcuffed him, and walked him to the back lane where other officers joined them. He stated that an officer slammed him against the hood of the cruiser a couple of times, hitting his head, and called him "a fucking Indian." Pruden identified Isaac as that officer.

The officers related a different version of Pruden's arrest. Isaac stated that he handcuffed, charged, cautioned and advised Pruden of his rights. He said that he took Pruden by the arm, stood him up, had him turn his back to him and put the handcuffs on with no other officers present. Isaac stated that Poneira helped take Pruden to the cruiser where Isaac placed him up against the front of the car with his legs resting against the vehicle, searched him and removed some cassette tapes and sunglasses. Isaac denied banging Pruden's head against the hood of the car. Eakin and Poneira stated that they used no force at all. All denied calling him "a fucking Indian" and stated that they did not hear anyone else say those words. Eakin placed Pruden in the back of his patrol car.

The news of Pruden's arrest was broadcast immediately and there was no suggestion of any other possible suspect. None of the officers in attendance held the slightest doubt that they had arrested the suspect they were seeking.

Constables Danny Smyth and Douglas Hooper arrived at around the time of Pruden's arrest and observed Hampton on foot near Electa Street and Gallagher Avenue. They stopped briefly to talk with him.

While they were talking to Hampton they heard a gunshot and within a minute they heard Cross broadcast for assistance. Eakin, Poneira, Smyth, Hooper, Isaac and Hampton immediately went in search of Cross.



A - Harper leaves DJ's **B** - Pruden arrested **C** - Harper shot

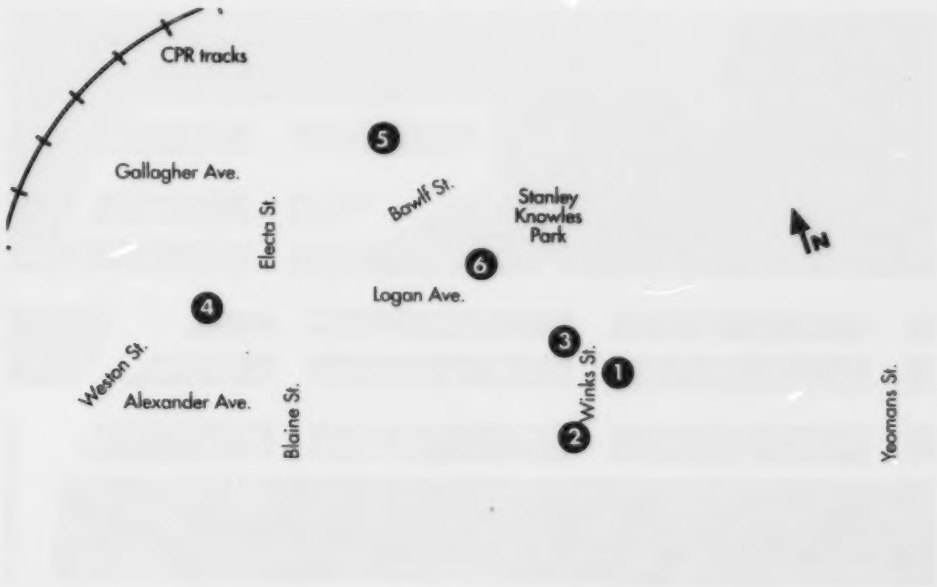
D - Harper taken to Health Sciences Centre **E** - Harper's house

The Shooting

At approximately 2:37 a.m., Cross left his patrol car and one minute later, while he was still in the back lane, he heard that the suspect had been arrested. Heading toward the place where the suspect had been arrested, he walked from the lane and then across Logan Avenue. He encountered J.J. Harper on Logan, adjacent to Stanley Knowles Park.

Upon seeing Harper, he approached him and asked for identification. According to Cross, Harper replied that he did not have to tell Cross anything. Cross said Harper then started to walk past him. Cross reached out, placed his hand on Harper's arm and turned him around. At that point, Cross said, Harper pushed him, causing him to fall backward onto the sidewalk. As he fell, he grabbed Harper, pulling him down on top of him. Cross testified that while he was on his back, he struggled with Harper and felt a tugging at his holster. He said that he thought Harper was trying to pull his gun from its holster and, therefore, he reached down to grab his revolver. He said the gun came out of the holster with his and Harper's hands on it. He testified that he and Harper both were tugging at the gun when it went off. The blast hit Harper in the middle of the chest.

According to Cross, following the discharge of the firearm, Harper straightened up, staggered back a few steps and fell. Cross indicated that it took a while for him to regain his composure. At 2:40 a.m. he radioed for his partner and an ambulance.



1 - Pruden drives into snowbank **2** - Allan arrested by Cross **3** - Cross and Hodgins park their patrol car **4** - Witness Michael Tymchuk stops and sees officer with gun drawn **5** - Pruden arrested by Constable Isaac **6** - Harper shot

The Aftermath

Smyth and Hooper each testified they heard the gunshot while they were speaking with Hampton near Electa Street and Gallagher Avenue. They then heard Cross' call for assistance. Eakin and Poneira said they did not hear the shot but heard Cross' radio transmission while driving down Gallagher toward Electa.

Upon hearing the shot, Hodgins, who had remained in her patrol car on Winks Street, rolled up her window, locked the car and ran into the lane where Cross had gone. She shouted for Cross over her radio and then, when she heard Cross' radio call for assistance, she ran back to the patrol car. There is some discrepancy between her testimony and that of the youth and of other officers from this point on. Allan testified, for example, that he observed Hodgins draw her gun when she heard the shot. She denied this.

Smyth and Hooper were the first officers at the scene. Eakin and Poneira then arrived, followed closely by Hampton and Isaac. Hodgins arrived shortly thereafter. Smyth and Hooper testified to us that Cross said, "He went for my gun and I shot him." They did not have any further conversations with Cross. Smyth and Poneira attended to Harper, who was still alive.

Smyth and Poneira rolled the unconscious Harper over onto his back and loosened his clothing to see if they could find where he had been injured. Poneira found the entry wound in his chest and tried to control the bleeding with the palm of his hand. Smyth got a first aid kit and placed a bandage over the wound, maintaining pressure. Harper became semi-conscious and was moving a great deal, thrashing his arms around. Poneira held Harper's wrists until the ambulance arrived. Smyth maintained pressure on the wound from the time he returned with the first aid kit until they arrived at the emergency ward at the Health Sciences Centre. He testified that Harper said nothing that he could understand.

The officers observed that Cross was wet and dishevelled, and had gravel and mud on his jacket, shoulders, hair and the back of his legs. He also had snow on his right pant leg and right shoulder. His jacket was partly undone and his revolver was in his right hand, pointed towards the ground. Eakin testified that Cross told him, "I approached him, asked him for I.D. and he hit me, knocked me down and went for my gun, it came out and he got shot." Eakin told Cross it would be best if he went and sat in the car, which he did. According to Hodgins' testimony to us, she brushed Cross off and he explained to her what happened: "He jumped me, Kath. I was on my back on the ground. He went for my gun."

Allan had remained in the back seat of the cruiser, and he said he thought that when Hodgins and Cross got in, Cross' glasses were broken. Cross was wearing glasses that night but he told us they did not come off in the scuffle and that it was Harper's glasses which had been knocked off.

At the inquest Allan testified that he heard Cross say, "I happen to reach for my gun." The youth testified before us that he heard Cross say, "It happened so fast, I pulled the trigger."

Eakin met Isaac behind the car Pruden was in, and instructed him and Hampton to return with Pruden to the stolen vehicle. Eakin said that he and Poneira would

secure the shooting scene. Both Isaac and Hampton testified they did not hear Cross say anything, nor did they overhear any conversations prior to leaving the scene. Isaac and Hampton took Pruden into their car and drove back to the stolen vehicle on Winks Street. Isaac charged and cautioned Pruden again. They questioned Pruden about the car theft but not about the shooting.

The First Responder Unit, a fire truck, arrived within minutes but the firefighters were not needed to assist Poneira and Smyth, who already were working on Harper. An ambulance arrived within eight minutes of being called. Eight minutes later, after attendants applied additional first aid and fitted Harper with trauma pants, the ambulance left for the Health Sciences Centre. They arrived at the hospital in three minutes. Smyth rode in the ambulance while Hooper followed in their patrol car.

According to police department policy, Hodgins, as senior officer at the scene, should have taken charge. However, being more concerned for her partner, she did not secure the scene or oversee the gathering of evidence. Nor did anyone else until the arrival of Const. Glen Spryszak, who was an acting sergeant that night.

Police department policy at that time also required that if a civilian were shot by a police officer, a police sergeant should be dispatched to the scene to supervise. One of the responsibilities of the street supervisor was to secure the officer's handgun.

Spryszak said that, after hearing of the car chase, he was dispatched at 2:38 and arrived at 2:54, after Smyth, Hooper, Hampton and Isaac had left. After speaking with Cross, Spryszak seized the officer's revolver and placed it in his own holster, and instructed Cross to return to his patrol car to sit with Hodgins. Spryszak spoke to Eakin and Poneira, who gave him a brief account of the chase and shooting. He did not record what they said in his notes. He stated that he kept everyone's conversation to a minimum as he knew there would be an investigation.

Insp. Eric Hrycyk was in charge of all officers and divisions in Winnipeg that night. He had monitored the radio calls from the time the chase began. Because of the seriousness of what had occurred, he decided to attend the scene and arrived at 3:00 a.m. Hrycyk discussed the shooting incident with a group of officers which included Eakin, Poneira and Spryszak, as well as Constables Graeme McGinnis and Brian Barker, who also had arrived at the scene. He instructed Spryszak to retain the revolver.

Hrycyk spoke to Cross and Hodgins together just outside their cruiser and instructed them to return to the Public Safety Building. The youth was still in Cross and Hodgins' car at the scene when Cross spoke with both Spryszak and Hrycyk.

The youth testified that he heard a police officer tell Cross, "Don't say nothing." Allan also testified at the inquest that Hodgins told him, "It was all your fault this happened," and called him a thief, saying, "See what your stealing got you into," and "This is all your fault." The youth, who has blue eyes and light skin, testified that Hodgins then called him a "blue-eyed fucking Indian." Hodgins denied making these comments.

Hrycyk instructed Barker and McGinnis to take the youth from Cross and Hodgins' vehicle to the Public Safety Building. Unaware that Pruden was in another cruiser, Allan assumed that it was his friend who had been shot.

Isaac and Hampton remained with the stolen car until 3:20 a.m., at which time Barker and McGinnis arrived with the youth and took charge of the stolen vehicle. Isaac and Hampton then went to the Public Safety Building with Pruden. Hrycyk gave instructions to Spryszak, Eakin and Poneira to examine and secure the scene, and instructed Spryszak to canvass the area for potential witnesses. Hrycyk then went to the Health Sciences Centre and, upon learning of Harper's death, instructed Hooper and Smyth to gather Harper's personal effects and to notify his family.

Sgt. Robert Parker of the Identification Unit arrived at the shooting scene at 3:30 a.m. to act as identification supervisor. He and Const. Craig Boan measured, photographed and videotaped the scene. They also searched the area and took blood samples.

Boan told us that he discussed with Parker the advisability of fingerprinting the gun but was instructed by Parker not to do so. The gun eventually was turned over to Const. William Kehler, the armaments officer. The scene was washed down by the Fire Department shortly afterward at about 6:00 a.m. Boan returned to the scene later that day at 3:00 p.m. to take photographs and search for further evidence.

While waiting in Hrycyk's office, Hodgins discussed the shooting with Cross. Cross showed her the blood on his jacket and his boots, and the splotches of blood on his leg. They were teardrop-shaped droplets of blood pointing away from his foot, indicating his foot was elevated when the blood splashed on it.

Upon returning to the Public Safety Building, Hrycyk spoke to Cross and Hodgins together, advising them of Harper's death. Hodgins requested the presence of Staff Sgt. Norm Wickdahl, president of the Winnipeg Police Association, and Hrycyk gave her Wickdahl's phone number. Noting Cross' blood-spattered clothes and boots, Hrycyk instructed Cross to remove them and to take them to the detective office.

Hrycyk notified Staff Sgt. Angus Anderson and detectives Henry Williams and Calvin Osborne. All three went directly to the Public Safety Building, as did the duty executive officer, Supt. McDougall Allen. Hrycyk also phoned Chief Herb Stephen to inform him of the shooting. Hrycyk then asked that Acting Insp. Kenneth Dowson, who was in charge of Crime Division, be called out. Superintendent Allen and Sergeants Anderson and Wickdahl all were briefed by Hrycyk when they arrived around 5:00 a.m. Anderson and Allen then went to the scene of the shooting at about 5:45. An officer from the Post Incident Trauma Unit also was notified of the shooting.

Although Pruden was interviewed by City police on the night of the shooting, the interview was limited to questions pertaining to the theft of the car. It was not until some weeks later that he was questioned about the shooting by Sgt. Wes Border of the RCMP, who was seconded to assist the Crown in preparation for the inquest.

Allan was questioned about the theft and signed a statement on March 9. However, he was not interviewed by police concerning the shooting until March 17, when he was questioned by officers Dave Shipman and Ron Morin about what officers had said at the scene. At that time he signed another statement. (Exhibit 27)

Cross was interviewed by detectives Williams and Osborne in the presence of Wickdahl. Hodgins was not present when Cross was interviewed by Williams and was

not questioned by any of the investigators. None of the other officers in attendance at the scene that night was interviewed by investigators.

Hodgins left to go to the communications centre, where she went over the tapes of the radio transmissions to complete her notes. She prepared a special report to the Chief, a supplementary report and her notes that morning with the assistance of her husband, who was also a Winnipeg Police Department member. She did not see Cross again until noon, when he was leaving.

The Harper family was notified of J.J. Harper's death at 9:30 that morning, seven hours after the shooting and six hours after his death.

At 9:00 on the morning of the shooting, the police department issued a news release which outlined the incident briefly but which did not identify any of those involved. The next day the department's Firearms Board of Enquiry submitted its report to the Chief, clearing Cross of any wrongdoing. That afternoon, Chief Stephen issued another news release which identified Harper (but not Cross). The release referred to the Board of Enquiry's finding that "death was precipitated by the assault of the officer by Harper and the subsequent struggle for his service revolver which accidently discharged." Stephen concurred in the board's finding that there was "no negligence" on the part of the officer.

An inquest into the death was convened by Provincial Court Judge John Enns on April 5. On May 26 Judge Enns issued his written report exonerating Cross.

CHAPTER 3

THE CHASE

In the examination of the events surrounding the death of J.J. Harper, a number of interrelated issues arise. In the next three chapters we will deal with some of these issues in the order of occurrence of the events to which they are tied. We begin with issues related to the pursuit of Melvin Pruden.

The Description of the Suspect

To evaluate properly Const. Robert Cross' account of events, particularly the basis on which he approached Harper that night, it is necessary to examine the source and the substance of police radio descriptions of the car-theft suspect. Those radio transmissions were taped in the radio room at the Public Safety Building and a transcript was entered into evidence at the Inquiry. By understanding the significance of those broadcast descriptions, we can begin to assess whether Cross had a reasonable basis to believe that Harper was the suspect whom police were seeking. It is important to remember that Pruden was wearing a grey jacket that night while Harper was wearing a black one.

The first description that went out over the police radio came from Hodgins when Pruden and Allan abandoned the stolen car. After she and Cross saw the two fleeing suspects, she broadcast the following: "Two males, dark clothing, my partner's out on foot pursuit."

Clearly, therefore, Hodgins and Cross had seen the suspects sufficiently to conclude that they were males and to get at least a general impression of what they were wearing. Hodgins also acknowledged that she observed one to be taller than the other.

After Allan was apprehended by Cross, he was questioned by Cross and Hodgins. The transcript shows that the following description of Pruden then was transmitted:

> Hodgins: Male, native ah black jacket, blue jeans.
>
> Dispatch: Received.
>
> Hodgins: This male is apparently approximately twenty-two years old. (Exhibit 9)

The source of this specific description is contentious. Allan, whose testimony we accept, said that he told Cross and Hodgins the nickname of the suspect was "Manny," but told them very little else:

A They asked me what he—never asked me about nothing that much. They just asked me what he was wearing. I told them. "I don't know."

Q Did you tell them anything about the jacket that he was wearing?

A No.

Q Did they ask you his age?

A Yes.

Q And what did you tell them?

A I said in between 19 and 17.

Q Did they ask you whether or not he is a native person?

A I can't remember. (p. 268)

Allan told us that he did not remember what Pruden was wearing and supplied no specific information to Cross and Hodgins. However, the officers testified that Allan did give them specifics. By referring to his notes during his testimony, Cross related the interview with Allan like this:

"Question: What did the other guy look like?"

Q What was his response?

A "Answer: He's a tall guy in his twenties wearing a black leather jacket and jeans."

My next question,

"Question: Do you know him?

Answer: No."

My next question,

"Question: Is he native?

Answer: Yes." (p. 1423)

In her testimony before us, Hodgins backed up Cross' account of the questioning. She could not explain why, if Allan had told them that the jacket was "black leather," she had not included "leather" in the description. Nor could she satisfactorily explain why, if Allan had said the suspect was "in his 20s," she used the age "22."

The final description of the suspect's clothing transmitted over police radio came from Const. Richard Poneira, who was pursuing Pruden on foot:

Poneira: He's going up on the dyke [sic], grey jacket, native.

Dispatch: All units he's on the dyke, grey jacket and pants. (Exhibit 9)

This was a correct description of the colour of Pruden's jacket. However, it did not put an end to the matter. Cross testified that when he heard Poneira's description, he believed it did not match the description he had received from Allan. He said he was confused when he heard that the suspect had been apprehended:

A [T]he only information I received then on my radio was that the male was described as wearing a sweater jacket, which didn't match the description of what I was originally given. (p. 1427)

The transcript shows that no one had broadcast such a description. Nevertheless, Cross said that he recorded the discrepancy in descriptions in his notebook and began walking toward the yard on Gallagher Avenue where Pruden had been arrested. He said he wanted to make sure that the right person had been apprehended. On the way, as he crossed Logan Avenue, he observed a man walking east on Logan. Under cross-examination Cross said:

A He was wearing a black jacket. From the distance I was at, I could not determine whether it was leather or cloth.

Q When you came close to him, did you observe whether or not the jacket he was wearing was leather?

A I observed at that point it was a cloth jacket. (p. 1423)

If Cross and Hodgins are to be believed, Allan had told them that the suspect was wearing a black leather jacket. Harper was wearing a black jacket and was an Aboriginal male; in those respects he partially conformed to the description they broadcast. But in other major ways he did not. He was in his late 30s rather than in his 20s, and it must have been apparent that he had not been running hard to elude police. At any rate, Cross made the approach.

It appears that other officers may have attempted to bolster the credibility of Cross' account by making their notes on the suspect's description correspond with his.

For instance, Constable Poneira testified that his notes indicated that the broadcast description of the suspect referred to a native male in his early 20s, wearing a black leather jacket. Oddly, Poneira's notes also recorded his description of Harper as a native male in his late 20s, wearing a black leather jacket. Harper's jacket was cloth and not leather.

Const. Grant Eakin also wrote in his notes that the broadcast description referred to a black leather jacket. Another officer, Const. William Isaac, took the extraordinary step of rewriting his whole notebook so that his notes would record the description's reference to a black jacket. We will have more to say on the issue of police notebooks in Chapter 5.

The broadcast description of the suspect and its subsequent interpretation in the notes of officers are a matter of great importance and concern. Cross said that he had been told by Allan that the suspect was wearing a black leather jacket and Hodgins transmitted a description to that effect, but did not refer to the jacket's being leather. Cross said he approached Harper because he was wearing what appeared to be a black leather jacket. Other officers adopted "black leather" as part of their notes. Clearly, they did not obtain that description from the radio transmissions or from their own observations. We believe that the officers inserted the reference to "black leather jacket" in their notes to support Cross' story. That is the only reasonable conclusion to draw.

We accept Allan's evidence that he did not give Cross and Hodgins specific information on Pruden's clothing. This suggests that Cross and Hodgins got a much better look at Allan and Pruden than they acknowledged, and that their radio description was indeed based on their own observations rather than on their questioning of Allan. It also suggests something else: in both their note-taking and their testimony at the inquest and at this Inquiry, several officers were less than truthful. This is a disturbing finding but it is one which we feel compelled to make.

Officers' Use of Guns

From time to time police officers have cause to draw their weapons. The public understands it may be necessary when an officer is in danger or when potentially violent persons are being arrested or approached.

There may have been such a situation on March 9, 1988 when Melvin Pruden was being flushed from hiding. It would not have been surprising to us if one or more officers, in the course of searching for him, had their guns drawn. What we found disturbing was the succession of officers pointedly denying that any officer's gun, except Cross', was drawn that night, even when there was clear evidence to the contrary.

Cross testified that it was during the struggle with Harper that his gun came out of its holster and that he did not have it drawn when he made his approach. We have to question whether the denials of other officers were intended simply to support Cross in his assertion that he did not have his gun drawn prior to his encounter with Harper.

Constable Hodgins

Allan testified that he observed Const. Kathryn Hodgins draw her revolver after hearing the shot. Hodgins admits that when she heard the shot, "It took me by surprise," and "I didn't know where exactly it was coming from." She immediately ran into the lane, shouting for Cross. It would be understandable for a lone officer, holding an accused in custody, upon hearing a gunshot and upon entering a dark alley, to have her revolver drawn. We would not criticize her for doing so. We believe she did have her gun drawn, yet she denied doing so.

It was apparent during the course of her testimony that the events of March 9 have affected Hodgins deeply. She testified to that fact, and spoke of the emotional and psychological devastation that followed that night. She had trouble performing her work and stated that what occurred at the inquest is beyond her recollection. Her doctor informed us in a letter that she has been diagnosed as suffering from a post-traumatic stress disorder.

While this is understandable and regrettable, it has impaired greatly the reliability of her testimony. In her appearance before us, Constable Hodgins recognized that some of her testimony conflicted with what she had said previously and with what other witnesses said. However, she persisted in stating that all the other versions (including her own at the inquest) were wrong and that she was now being accurate. We do not agree, nor do we think that her evidence is reliable.

Although Allan's evidence at our hearings was not as detailed as what he gave at the inquest, we are satisfied that any differences are explained by the passage of time and the considerable distress he experienced at the scene of the shooting and subsequently.

We are well aware of the dangers inherent in accepting the testimony of persons involved in the commission of offences when they are called upon to testify as to the circumstances surrounding those offences. Generally, one might expect that such witnesses would be tempted to shade their testimony in order to put themselves in the best possible light and to shift the responsibility for illegal activity onto others. Having considered those caveats about accepting such evidence, we nonetheless feel we can accept the evidence of Allan on this issue. We can conclude only that Hodgins denied having her gun drawn to support the contention of other officers, including Cross, that they did not have their guns drawn.

Constable Hampton

Despite his statements to the contrary, we conclude that Const. Randy Hampton also had his revolver drawn that night. Melvin Pruden testified that he saw Hampton looking at him in the lane and testified that, "He was pointing a gun at me." Pruden gave a detailed description of Hampton holding his revolver with both hands extended in front of him as he said, "Stop or I'll shoot" or "Freeze or I'll shoot." When Pruden ran, he observed Hampton lower his revolver.

Hampton, on the other hand, testified that he never drew his revolver while he was walking down the back lane looking for Pruden, and said that the only object in his

hands that night was his portable radio. It is clear he did have his radio in his hand, for there are several radio transmissions from him while he was on foot in the back lane. He said that he did not have his flashlight in his hand and that at no time that evening was his revolver drawn.

Testimony from other officers did not clarify the matter. Const. Grant Eakin said during his examination before us that when he saw Hampton he was sure that the officer was not holding a gun. Later, during cross-examination, Eakin conceded that he really couldn't see what Hampton had had in his hand, but remained adamant that he had not seen any officers that night with drawn revolvers. But that does not end the question of Hampton's gun.

When Pruden eluded Hampton, Poneira took over the chase. Hampton left the lane, ran west down to Blaine Street and across Logan Avenue.

A vehicle driven by Randy Houston was passing by on Logan Avenue between Winks Street and Blaine Street at the same time as Hampton crossed Logan. One of the two passengers in the car, Linda Morissette, testified that she observed an officer holding a revolver in the air while jogging across Logan Avenue between Electa Street and the railway tracks. The person she saw was only three to four car-lengths in front of her vehicle. Morissette was in the front seat with an unobstructed field of vision. The officer was holding the revolver in the air with the right hand, she said, and grasping the right wrist with the left hand. Hampton acknowledged that he was the officer Morissette had seen cross Logan, but again denied having his gun drawn.

Although Morissette was certain that she saw an officer with a gun drawn, she did express some uncertainty about the gender of that officer. At the inquest proceedings before Judge Enns, Morissette initially testified that she had observed a "guy" walking on the right side of the street as she proceeded west on Logan. When pressed on cross-examination, she stated that she thought the officer was female. Her confusion may have resulted from the darkness and the fact that male and female officers wear the same uniforms. That a witness may not be sure about all parts of her evidence is not surprising, for few people would be able to state with certainty what had occurred at all times during a particular evening, although they might be absolutely certain about one or two matters. One must be careful about such evidence, however, and accept it only after carefully considering all other factors, including whether the witness' recollection is confirmed by any other evidence.

We found Morissette to be an honest witness and we believe what she said was essentially true. The fact that Pruden and at least one other witness also testified to observing an officer with a revolver drawn in that area adds credence to Morissette's evidence. That other witness was Michael Tymchuk, who was driving home from work shortly after 2:30 a.m., when he stopped at a stop sign at Logan Avenue and Weston Street. There he observed a police officer, whom we believe to have been Hampton, with his back to him, standing on the north sidewalk of Logan, across the street from him. The officer was leaning over a fence with his hands spread out. Tymchuk described him as having dark hair with clothing slightly open and jacket lifted up a bit on the right side. Tymchuk was at the intersection for approximately 30 seconds and

noticed the officer turn his head every once in a while, as if he were trying to look down the side of the house of which he was standing in front. Tymchuk also noticed a radio on the left side on the officer's belt. He explained in detail how he saw a revolver in the officer's hand, resting on the fence. The officer's hand and revolver were raised to a vertical position as the officer turned his head. There was no doubt in Tymchuk's mind that the officer had his revolver drawn.

When Tymchuk heard of the shooting the next afternoon, he concluded that what he had observed was connected to the shooting but did not consider his observations important. Between two weeks and a month later he telephoned the police department and spoke to someone, whose name he could not recall, who informed him that, in his words, "There are a number of people that have information. If you feel that you really want to say something, contact some investigators the next day." He was not asked for, nor did he disclose, his name. Because of the dismissive response and his uncertainty about the significance of his observations, he did not bother calling back. Tymchuk's name, address and telephone number should have been taken and at least forwarded to the appropriate investigators, but they were not.

After seeing the Inquiry hearings on television, Tymchuk recognized the importance of his evidence. He contacted his lawyer, who in turn contacted Commission counsel. Tymchuk was interviewed and, within a short time, testified before us.

Tymchuk was absolutely certain about what he had observed. He stated clearly, and despite intensive cross-examination, that a police officer was carrying a revolver that night. We accept his evidence.

We also heard other, less conclusive testimony about the matter of drawn firearms. Jeff Bedosky, who had driven by the scene before and after the shooting, told a Winnipeg police sergeant on the day of the shooting that he had seen an officer carrying what may have been either a gun or a radio. At the inquest he did not mention a gun and cross-examination on the point was disallowed.

Allan, Pruden, Morissette and Tymchuk all testified that they saw an officer with a drawn revolver that night. Each of these witnesses was reliable on this matter and the totality of their evidence leads inexorably to the conclusion that Hampton and Hodgins had drawn their guns and were carrying them that night.

We found Hampton's denials unconvincing. For example, he said:

> In a situation like that, for me to have my gun out, walking down the lane, in any situations as I've stated previous, if that's a citizen, I'm in hot water. If that's my partner, I'll tell you, you're not going to have too many other partners on the police department, if you come around a corner with your gun sticking out in somebody's face. Thirdly, if it's a suspect, I'm not going into the back of a yard, looking around corners, where that person can hear me jingling down the street with 15 pounds of equipment, I'm not walking into that back yard with him knowing where I am, I have no idea where he is, with my gun out because all it takes is a bump, a push, it takes a person that's a little bigger, I'm not huge, and a person that's a little bigger than me, and my gun's gone. (p. 649)

Winnipeg Police Policy on Firearm Use

Constable Hampton testified that it is not permissible for officers to draw their weapons and threaten to shoot a fleeing suspect. He testified that to have a revolver drawn and yell "freeze" would be unacceptable conduct and there would be adverse consequences if an officer pointed his or her gun without due cause.

This belief suggests one possible motive for denying he had his revolver drawn. As Judge Enns stated in his report:

> The following factors have lead [sic] me to the conclusion that both the allegations of racial slurs and the allegations of drawn revolvers are not credible:...
>
> (e) In the absence of any suggestion of an armed suspect, armed robbery or the like, and especially after [Allan], whom Constable Hodgins took to be even younger than 14 or 15 years, it seems very unlikely that police would be chasing young, unarmed boys with drawn revolvers, in direct contravention of the stated guidelines for use of their revolvers. (Exhibit 3, p. 13–14)

Police policy about the use of firearms is less straightforward than Judge Enns suggested. Staff Sgt. Menno Zacharias, who was in charge of training police recruits, stated there was no clear policy with respect to the appropriateness of an officer's drawing his or her revolver. In his opinion, any officer who drew his or her gun when searching for a suspect in a darkened back lane would be justified.

Zacharias told us that officers receive seven hours of basic training on the handling and authorized use of guns. He testified:

> Q Are recruits instructed on when it is and is not permissible to draw a firearm in the course of their duties as opposed to actually using, firing the handgun in the course of duties?
>
> A Yes, they're certainly given general guidelines in that area. We don't expect or we don't want members of the department to be drawing their firearms indiscriminately in situations where it would be unwarranted. But by the same token, we don't ever want to leave our people with the impression that they cannot draw the gun if they feel that in their judgment it's necessary to do so.
>
> So we're walking a very fine line there in terms of saying, "In this situation or in these ten situations you can. In these ten you can't", so we don't even attempt to do that. What we do instead is give them a basic guideline and instruct them to use their judgment, bearing in mind that they're going to have to justify their actions at some point in time. If they perhaps didn't do the right thing, they're going to have to justify it. (p. 2654–55)

He testified that an officer in the position of pursuing a suspect in a stolen car and not knowing if the suspect is armed is justified in having his or her revolver drawn, "because there is a perceived danger to the officer."

All officers are provided with a card which contains guidelines for the use of firearms:

> **GUIDELINE FOR USE OF FIREARMS**
>
> When the Police Officer's life is in danger.
>
> When the life of another person is in danger.
>
> If the Police Officer is in danger of grievous bodily harm.
>
> If another person is in danger of grievous bodily harm.
>
> ANY USE OF A FIREARM MAY REQUIRE JUSTIFICATION IN A COURT OF LAW
> (See CCC Section 25, 26, 27)
>
> **FIREARMS SHALL NOT BE USED**
>
> Firearms shall not be used to stop a fleeing person.
>
> Firearms shall not be used to immobilize a fleeing vehicle.
>
> Warning shots must NOT be fired.
>
> Firearms shall not be used when there is a danger to innocent bystanders.
>
> ANY DISCHARGE OF A FIREARM OTHER THAN DURING TRAINING MUST BE REPORTED IN WRITING TO THE CHIEF OF POLICE BEFORE COMPLETION OF TOUR OF DUTY. (Exhibit 22)

There is clearly a lack of monitoring of when and why officers draw their guns. Officers do not have to report the fact that they draw their guns. Zacharias testified,

> I don't believe that's a major concern and the reason I say that, our experience has been that members of the Winnipeg Police Department have used their firearms judiciously. They haven't been abusing their use of the firearm and we haven't had a need to monitor it. (p. 2657)

Zacharias testified that he would not be concerned if it were found that Hampton did point his gun at Pruden and say, "Police, freeze."

> Q The Commissioners have also heard ... from a civilian witness, indeed the suspect that was hiding himself, that he stepped out momentarily to show himself to a single police constable who stopped in a stance, pointed his service revolver at him and said words to the effect of, "Police, freeze," or "Police, stop." If in fact that occurred, in your opinion as a training officer, was the constable justified in handling the situation in that manner?
>
> A I would have no concern about that approach at all.
>
> Q Would you tell the Commissioners why that is, sir?
>
> A What the individual I believe is doing is he's protecting himself while at no time endangering the life of the suspect. What would happen in that type of a

> scenario is that the officer in all likelihood would, as you say, instruct the individual to stop. If the individual stopped, he would probably instruct the individual to go into one of the positions where we would search him. The officer would put his gun away, he would handcuff the individual and he would search him. What I'm suggesting is there is no danger to the suspect and the officer has properly looked after his own safety. (p. 2659)

When asked if Cross would have been justified in approaching Harper with his gun drawn, Zacharias replied, "I wouldn't have any great difficulty with a situation where he had his gun drawn." He went on:

> [T]he fact that he is a suspect, the fact that a vehicle ... had been stolen, there was a chase, people fled the scene and when you're dealing with a potential suspect in a crime you have no knowledge in many cases of whether they are armed, whether they're unarmed, how they're likely to react.... My perception of having the gun drawn in this instance might well be having the gun drawn and down at his side, which I don't think is an overly aggressive pose under these circumstances, and in a situation where the scenario runs its normal course, there would be no problem with that. (p. 2663–64)

We disagree with Zacharias if he meant to suggest that it is reasonable for a police officer to have his or her gun drawn when approaching a citizen walking along a street. Such conduct is not an acceptable use of police power.

Conclusions

There may have been some justification for Hampton to have drawn his gun while searching for the suspect in the back lane. He had no idea whether the suspect was armed and no bystanders were in immediate danger. The same is true of Hodgins. Having heard a shot, she proceeded down the back lane looking for her partner. The lane was dark and she did not know who had fired the shot. Her partner was not responding. She was justified in having the gun drawn and at the ready.

However, there was no excuse for Hampton to keep his gun drawn once he had seen Pruden was unarmed and was running away. He was not in danger and could not use his gun to stop a fleeing suspect. We believe, as well, that Zacharias was wrong to suggest that Cross would have been entitled to approach Harper with his gun drawn. The information available to Cross at that time simply would not have justified such an act. The fact that the officer in charge of training thinks otherwise causes us considerable concern.

While service revolvers are necessary in some circumstances to protect police officers and citizens, the public is entitled to expect that they will be handled safely. To avoid the improper use of revolvers, the training of police officers in the use of weapons must, in our opinion, be enhanced to give greater guidance to officers. Officers must receive complete training on weapons safety and handling procedures.

We considered recommending that Winnipeg police officers be required to make a report every time a weapon is drawn. We have not done so in view of the tremendous paperwork such reporting would entail.

Of greater concern to us is the lack of candor of some Winnipeg police officers. We are very disturbed at their eagerness to deny they drew their weapons, particularly when the evidence shows otherwise. We heard evidence to indicate that this police predisposition to deny the use of weapons was not limited to the night of March 9, 1988.

When Constable Spryszak was asked during his testimony if he had ever run down a city street with his gun drawn, he answered, "No." When asked to reconsider his answer, he again said without hesitation, "No." A television videotape then was played of an unrelated incident in April 1988, showing Spryszak running down a city street with his gun drawn. When asked to explain his previous denial, Spryszak shrugged his shoulders and suggested that he wasn't "running," only "jogging."

Spryszak seemed surprised at the videotape showing him running down a street with his gun drawn. Perhaps he didn't know it existed, and was surprised at being caught so easily at giving what is, at best, inaccurate testimony. Perhaps, as well, he simply had no recollection of his having done so. That, however, is a difficult conclusion to reach when we are considering the evidence of a police officer with almost 15 years of experience. Undoubtedly, he was aware as well that having a gun drawn had become an issue at both the inquest and the Inquiry.

We are aware that there are things some people will deny despite overwhelming evidence, because they feel that they are being asked to admit that they did something wrong. Whether what they did actually was wrong is irrelevant. It is the suggestion that it was wrong which brings about the denial. It is as though it is easier to deny the existence of an event than to attempt to justify it. It is our conclusion that the evidence of both Hampton and Spryszak falls into this category. Despite Zacharias' assurance that having a revolver drawn was acceptable in the circumstances, Hampton chose to deny that he had done so, apparently in the belief that such an admission would have placed him and perhaps other officers in the wrong light. It would seem that Hampton felt he would be failing in his role to protect the department and his fellow officers if he admitted to having his gun drawn. Hampton and Spryszak were not aware there was evidence to contradict their assertions.

If Hampton had admitted readily that he had drawn his revolver that evening, that might have been the end of the matter. Having his gun drawn does not suggest Cross did. However, the fact that he and Hodgins so strongly denied having done so suggests to us that Hampton and others were determined to portray the department, and Cross in particular, in the best possible light.

CHAPTER 4

THE SHOOTING

It is difficult to piece together the facts of the fateful encounter between J.J. Harper and Const. Robert Cross. Only Cross survived that encounter and we have only his account of the struggle which culminated in the death of Harper. In this chapter we will examine the substance of that account as well as the testimony of others in an attempt to determine the basis on which Cross approached Harper and to assess the implications of their encounter.

The Approach

As J.J. Harper walked toward home on the morning of March 9, 1988, we believe that the first officer to see him was Const. Grant Eakin. Eakin testified that he had observed a man walking on Logan Avenue between the railroad tracks and Electa Street when he drove down the street a minute or two after Const. Randy Hampton flushed Melvin Pruden from hiding. In his supplemental report, dated March 17, Eakin stated that Harper's body and the person he saw on Logan were dressed identically. We believe Hampton also must have seen Harper. However, Hampton testified before us that he could not remember whether he saw anyone on Logan.

At approximately 2:38 a.m., while Cross was still in the back lane, he heard by radio that the suspect, who was being chased, had been arrested. He then moved from the lane to Logan Avenue and crossed the street. He confronted Harper on Logan adjacent to Stanley Knowles Park. Within two minutes (at 2:40) Harper had been shot, and Cross radioed for his partner and an ambulance.

It is clear from all the evidence that he did not confront Harper until *after* Pruden had been arrested. Cross' evidence was that within a minute of hearing of Pruden's arrest he confronted Harper.

It was obvious that Harper didn't fit major elements of the description of the suspect. Cross and Hodgins described the man whom they had seen fleeing from the stolen car as a "native male, 22 years of age, wearing dark clothing." Harper was a native male wearing dark clothing, but he was 37 years of age, considerably heavier than Pruden and of much stockier build. Pruden had outrun the police, while Harper was walking and apparently not breathing heavily.

Cross testified that he did not have his revolver drawn and that his radio was in his belt when he approached Harper.

This description of their encounter comes from his statement to police:

> I approached him by angling north west across Logan Avenue intersepting [sic] him on the north sidewalk of Logan between Winks and Blaine Street. I stopped him and asked him, "Sir, can you show me some identification." He replys, [sic] "No I don't have to show you any." At this time I could smell liquor on his breath and he seemed belligerent so I advised him, "You match the description of a suspect I'm looking for, for the theft of auto and I would like to see some identification." He stated "I don't have to show you nothing," and started walking east on the sidewalk. (Exhibit 23)

In his testimony before us Cross was asked:

Q As Mr. Harper started to walk away from you, did you in your opinion at that point, have reasonable and probable grounds to effect his arrest?

A At that point, I had reasonable and probable grounds to believe that he was a strong candidate or a suspect in this theft of auto, and that I had the right to gain information, meaning identification, from him. (p. 1444)

Cross said his suspicion was heightened when Harper turned away:

Q After you did that and had the conversation with him, which you say you did, and he proceeded to walk away from you, had you decided at that point that he was any more suspicious?

A Yes, I did.

Q Why?

A Because he was being uncooperative and he was trying to get away.

Q You say he was being uncooperative and trying to get away. By uncooperative, I take it you're referring to his belligerence and his failure to show you identification?

A I believe I treated him with respect. I explained the situation, and given those circumstances, the lateness of the hour, no one being around, that I do not feel that he would have felt threatened by just producing some identification.

Q Well, as a result of his conduct and his demeanour, as he commenced to walk away from you, did you decide that you had reasonable and probable grounds to effect his arrest?

A I did not make that decision at that point. What I did at that point was I reached out and took hold of his right arm I believe, to turn him and try and talk to him some more. I just wanted to try and reason with him to explain in more detail as to why I wanted to see some identification. I—the last thing I wanted was a struggle and what happened, I mean I didn't want that.

Q You did not arrest him that evening?

A No.

Q And at no point in the encounter between you and he was he under arrest?

A No. (p. 1445–46)

Cross later testified that he had very little reason to view Harper as a suspect:

Q [Y]ou had some suspicion that maybe the police had the wrong fellow and this fellow could conceivably be the right fellow?

A That's right.

A But you would agree with me it wasn't anything more than some slight suspicion?

A That's correct.

Q Not anything close to anything like reasonable and probable grounds to arrest a person?

A Not at that point, no. (p. 1483)

The manner of Cross' approach to Harper provides further indication that he did not consider Harper a likely suspect.

Staff Sgt. Menno Zacharias, the departmental training officer, testified that the way Cross approached Harper was contrary to basic training. Zacharias testified, "There were certainly problems with it, no doubt." Cross' stance and the fact he had his holster side to Harper indicates that Cross did not approach Harper as a suspect. Cross did almost everything a constable is told not to do.

Zacharias testified about the instruction officers receive as to when it is permissible to stop and check someone on the street. Zacharias said that, in training, officers spend about 22 hours on powers of arrest. The instructional material is reviewed by Crown attorneys to ensure that it remains current.

Zacharias told us that only in two situations can officers confront citizens on the street: when an officer intends to make an arrest, or when an officer wants to talk to or question a citizen. He stated:

[I]t's going to be a very conversational thing. You're going to be polite ... and saying what it is that you want, why you want it and try to determine

> whether in fact the person is legitimately at that location or whether he may be in fact involved in criminal activity.... (p. 2672)

Officers are taught to ask for identification as Cross did. Zacharias stated that obtaining a name gives the officer a chance to check the person out. However, he said, officers are instructed that they cannot just stop people on the street at random. It would seem that there is little wrong with the training given. What was deficient was Cross' implementation of what he had been trained to do.

Cross, we believe, got caught up in the excitement of the chase. We believe that he decided to stop and question Harper simply because Harper was a male Aboriginal person in his path. We are unable to find any other reasonable explanation for his being stopped. We do not accept Cross' explanation. It was clearly a retroactive attempt to justify stopping Harper. We believe that Cross had no basis to connect him to any crime in the area and that his refusal or unwillingness to permit Harper to pass freely was, for reasons which we discuss later, racially motivated.

As disclosed by the facts, Cross had neither reasonable nor probable grounds to believe that Harper was the suspect the police were after. He had been informed that the person chased from the very lane he had been watching had been apprehended, and he had no reason to believe that his fellow officers were mistaken. If Cross had doubts or suspicions about the suspect in custody, he erred in not seeking further information by radio from those who had arrested Pruden. Harper was walking, not running, and it is highly unlikely that he would have gone far had Cross decided to radio quickly for further information. Also, according to Cross' own account of the incident, Harper was not behaving or walking in a suspicious manner. It would appear, then, that Harper simply had the misfortune of being an Aboriginal man in dark clothing, in that area late at night. In our opinion, Cross exercised poor judgment in pursuing the matter forcibly, as he did after Harper legitimately had refused to identify himself.

The Power of Arrest

Although we conclude that Cross had no reason to believe that Harper was the suspect who was being sought, it is useful to review the law concerning police officers' power to approach citizens.

Under common law, a police officer's general duties are to prevent crime, to protect life and property, and to preserve the peace. While these duties are wide in scope, the powers with which an officer legitimately may carry them out are not unlimited. Just as there are necessary legal limits placed on the freedoms of citizens, so too there are limits placed on the powers of police officers. As Supreme Court Chief Justice Brian Dickson observed, "[The] fact that a police officer has a general duty to prevent crime and protect life and property does not mean that he or she can use any or all means for achieving these ends...."[1] Put differently, a police officer can interfere with the liberty or property of a citizen only if he or she is legally authorized or justified in doing so.

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1 *Dedman v. The Queen*, [1985] 2 S.C.R. 2, p. 12.

Under common law and within the general scope of police duties, police officers conducting an investigation have the right to ask questions of citizens and to request they identify themselves. Officers do not, however, have the power to force citizens to comply.

In an encounter between an officer and a citizen, the officer legitimately may exercise his or her right to ask questions and request identification, and generally the citizen will comply, but also legitimately may exercise his or her right to refuse to do so. Up to this point, both are within their respective legal rights and powers. But, if an officer does not place the citizen under arrest, or if the officer is not making a lawful detention and has no intention of doing so, the officer exceeds his or her authority by grabbing and detaining the citizen forcibly. While the use of force to detain individuals falls within the general scope of a police officer's rights, an officer's actions may amount to an unjustifiable use of police power if he or she uses force without making a lawful arrest or detention. Beyond those parameters the officer's use of force is not authorized or justified.

The courts have held that unless a person is placed under arrest or is under a statutory duty to comply (as in the case of a person operating a motor vehicle), producing identification and answering police inquiries is strictly a moral or social obligation.[2]

Section 7 of the *Canadian Charter of Rights and Freedoms* [Part I, *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.)] provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 9 of the *Charter* provides that: "Everyone has the right not to be arbitrarily detained or imprisoned."

This *Charter* right is augmented by the *Criminal Code*, which provides that an arrest can be made only if the police officer is empowered to do so by a warrant, or if the officer has reasonable and probable grounds for making the arrest, or if the officer finds the person breaking the law. Section 495(1) states:

> A peace officer may arrest without warrant:
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence,
>
> (b) a person whom he finds committing a criminal offence, or

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2 *Moore v. The Queen* (1979), 43 C.C.C. (2d) 83 (S.C.C.); *R. v. Guthrie* (1982), 69 C.C.C. (2d) 216 (Alta. C.A.).

> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal in any form set out in Part XXVI-II in relation thereto, is in force within the territorial jurisdiction in which the person is found.

In addition to the requirement for reasonable and probable grounds, the police officer also must have a reasonable and honest belief in the existence and basis of such grounds.[3] Unless these requirements are met, the arrest is arbitrary and, therefore, unconstitutional.

Under section 25 of the *Criminal Code*, a police officer is authorized and justified in using as much force as is necessary in enforcing and upholding the law. Section 25(1)(b) provides:

> Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (b) as a peace officer or public officer, is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

If a police officer is acting legitimately within the scope of his or her duties, not only is the officer justified in doing what he or she is authorized to do, but the officer also is justified in using as much force as is necessary for that purpose. But in order for section 25 to protect a police officer's conduct, the police officer must have reasonable grounds for what he or she is doing and the police officer also must refrain from using more force than is reasonably necessary. Unless these two requirements are met, a police officer's conduct is not protected by this section.

The purpose of section 25 is to protect, not to empower. It is meant to be a shield rather than a sword, and it in no way alters or modifies police powers. As long as a police officer acts within the authority of the law, section 25 will protect him or her. The minute the police officer steps outside this authority, this section's protection disappears. An officer is not acting within the authority of the law when he or she forcibly grabs and detains a citizen whom he or she has no intention to arrest or detain.

Courts have had difficulty in defining and separating the concepts of arrest and detention. These difficulties have been compounded by a lack of clear and unambiguous legislation dealing with the nature and the powers of arrest. As a result, courts often have been called upon to balance the civil rights of the individual and the necessary powers of the police.

The moment of arrest is crucial, because it is at that moment that the legal relations of the individual and the state may conflict. At the moment of a lawful arrest, an

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3 *R v. Duguay* (1989), 46 C.C.C. (3d) 1 (S.C.C.).

individual loses his or her right to resist what otherwise might be an unlawful assault, and the person moves from a state of liberty to one of lawful detention.

According to the Supreme Court of Canada, an arrest is defined as the actual "seizure or touching of a person's body with the view to [his or her] detention."[4] While the law recognizes a police officer's power to ask questions without making an arrest or detention, it also recognizes a citizen's right to ignore these questions and walk away. If that occurs the police officer is faced with a dilemma: the officer either must let the citizen proceed on his or her way unharassed, or the officer must make an arrest or find some other lawful power to detain the individual if he or she wishes to have the questions answered.

Unless the police officer has reasonable and probable grounds for believing that the individual has committed an indictable offence, an arrest might be unlawful. Furthermore, unless the police officer is authorized under statute or common law to detain the individual, any detention made might similarly be unlawful.

Staff Sergeant Zacharias testified that officers are instructed that if a person won't give his or her name and simply walks away, to "abide by that decision." He stated that, "I know of no circumstances in which an officer can then grab a citizen." Officers cannot grab onto someone if that person is not going to be arrested and officers are taught this.

If an arrest is made improperly it may be unlawful, and the police officer might not be acting within the scope of his or her duty. In such a situation, a police officer would not be protected in the use of force.

If police officers use force in the course of arresting or detaining an individual, their actions could amount to an assault which can be prosecuted in a court of law if they do not have legal justification.

Furthermore, such an assault may be resisted by virtue of s. 34(1) of the *Criminal Code*[5] which provides:

> Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

In other words, citizens have the right to resist an unlawful arrest, and the right to protect themselves against any unlawful arrest or the unlawful use of force.

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4 *R. v. Whitfield,* [1970] 1 C.C.C. 129 (S.C.C).

5 *R. v. Biron* (1975), 23 C.C.C. (2d) 513; *R. v. O'Donnelly; R. v. Cluett* (1982), 3 C.C.C. (3d) 333 (N.S.S.C). (The decision with respect to *Cluett* was reversed by the S.C.C. on other grounds in *Cluett v. The Queen* (1985), 21 C.C.C. (3d) 318.)

Cross' Account of the Shooting

We must examine in some detail Cross' account of his encounter with Harper and the manner in which that account was recorded by other officers at the scene.

When Harper declined to show him identification and turned to walk away, Cross attempted to prevent him from leaving. Cross told us that he did not have time to consider alternatives such as checking with other officers to see if they arrested the right person or even calling for assistance. Instead, he reached out and took hold of Harper's right arm. In the statement he gave to Sgt. Williams he described his actions:

> He had only made a step or so when I reached out and took hold of his right upper arm with my right hand and he turned to face me, so I reached out with my left hand taking hold of his right wrist.
>
> The suspect leaned forward pushing me with both hands on the front of my shoulders.... I was off balance and fell backwards.... (Exhibit 23)

Cross testified at the Inquiry that Harper:

> ... partially turned, spun quickly and pushed.... He turned quickly, caught me off guard, pushed with both hands on my upper shoulders. I went down. I was trying to grab hold of his jacket, grab hold of him, grab hold of anything to break my fall. I remember lashing out with my left hand and knocking off his glasses. I believe I had hold of both sleeves of his, you know upper jacket. (p. 1449)

Cross said that after they were on the ground, he put his left foot on Harper's chest to kick him off when, he said, he felt a tugging in the area of his holster.

In his statement to the investigators Cross stated:

> I placed my foot in the centre of his chest attempting to push him back. He grabbed a hold of the butt and holster of my revolver pulling it forward. I reached down and took hold of the butt of my revolver pulling it backward. He took hold of my right hand *which the gun was in* and started to yank at the gun. The snap came undone on the gun holster and he yanked at the gun so that it was between us. I had grabbed a hold—so I had the butt of the revolver and my trigger finger was hooked through the trigger guard I guess on the trigger. I don't know exactly where our hands were but I was pulling with both hands on the butt of the revolver while he was yanking at my hands and the barrel of the revolver with the muzzle pointed at his chest.
>
> The snap came undone and the revolver came out. He had both hands on the gun and I had my right hand on the frame and my left index finger on the trigger. (Exhibit 23) [Our emphasis]

At the Inquiry Cross testified:

> The gun came out, we fumbled for it. I remember having my hand around the cylinder, he had his hand I believe on the butt and the barrel of the revolver. I managed to get a finger in the trigger, around the trigger guard and on the trigger.
>
> Through the pulling and yanking, the gun discharged. (p. 1450)

The first officers to arrive were Const. Danny Smyth and his partner, Const. Douglas Hooper. Smyth and Hooper, whose evidence we accept on this point, stated that Cross acknowledged pulling the trigger, and they testified that Cross said, "He went for my gun and I shot him."

Const. Grant Eakin, who arrived shortly thereafter, testified Cross' first words were, "I approached him, asked him for I.D. and he hit me, knocked me down and went for my gun, it came out and he got shot."

Eakin stated in his special report to the Chief of March 9, 1988:

> I spoke with Cst Cross at this time, and *he stated to me that this male fit the description of the accused and he went to spot-check him.* At this time the male swung at him and a struggle ensued, at which time the male attempted to grab his gun, and on struggling the gun came out and the male was shot. (Exhibit 80) [Our emphasis]

Eakin could not explain to us how he could add those statements we have italicized when they were not in his notes, most of which he said he wrote at the scene.

Const. Richard Poneira reiterated this version when he testified that he heard Cross tell Eakin that he went to check a male who attacked him, got him down, went for his gun, and the gun came out and went off. Poneira told us he didn't write this in his notes as he couldn't recall the comments verbatim, even though he made his notes shortly after speaking with Cross. He did not include what he heard in his special or supplementary reports. Poneira observed Cross with his revolver in his right hand and saw him put it in his holster as they arrived.

Cross explained to Kathryn Hodgins what happened when he returned to their patrol car. According to her testimony at the Inquiry, Cross said, "He jumped me, Kath. I was on my back on the ground. He went for my gun."

At the inquest Allan, the youth, testified that he overheard Cross in conversation with Hodgins:

> [W]hen he took his glasses off he says, he said,"oh my God." He goes "you [sic] shouldn't have fought," ... I remember he says, all I remember these parts, words like, *"I happen to reach for my gun,"* and then he said "I pulled the trigger," and then they went off, and then there's this another male cop that pulled up beside us, an older one. He got out of the cop car and they started talking, and the older cop's, like, after you open the door like I heard them say, "you just say that," and then the other one said, "I will say that." (p. 237–38) [Our emphasis]

The youth also testified that someone at the scene had told Cross to say the gun went off accidentally.

Const. Glen Spryszak said he made some brief notes but did not quote Cross verbatim and may have missed some facts. He paraphrased Cross: "Smacked me. Went for my gun. Went off." In his special report to the Chief he stated that Cross "indicated to me that he tried to spot check the male." Spryszak could not recall whether Cross or Eakin had told him this detail. He said, "There was no mention made of whether it [the gun] was drawn or not."

Insp. Eric Hrycyk told us that he spoke to Cross and Hodgins together, and that Cross related the sequence of events:

> Constable Cross told me he grabbed the right arm and the fight began. Immediately upon grabbing Harper's right arm, Cross held on and winds up on his back with his foot against Harper's chest, his left foot. The male, again referring to Harper, grabs the gun and so does Cross, and it winds up with Cross' two hands on the butt of the revolver after a fight for the revolver, and the male with the rest. As the gun began to slip away from Cross, it goes off. The male has been shot and Cross calls for the ambulance. (p. 2174)

Hrycyk indicated this was not a verbatim quote but, rather, notes he made on the essence of the conversation, notes probably made at the scene or in his vehicle afterwards. At the inquest Hrycyk testified, "He [Cross] told me that he [Cross] grabbed Harper by the right arm and before he knew it he was on his back." Cross told Hrycyk that Harper pushed him.

Conclusions

While it is difficult for us to determine exactly what happened when Cross and Harper met, how they came to be on the ground or how Harper came to be shot, we are able to reach some conclusions. Most of our conclusions are based on statements uttered by Cross at one time or another. Even if we cannot say exactly what happened, we can say, with some assurance, that the confrontation did not occur in the manner which was accepted as fact by the Firearms Board of Enquiry, the police chief and Judge Enns at the inquest.

Cross said he thought Harper was a suspicious person worth questioning and investigating, but not sufficiently suspicious to arrest. Although Cross knew that a suspect already had been apprehended and although he knew that Harper did not fit completely the description of the suspect which he and Hodgins had broadcast, he nevertheless stopped him and asked to see identification. Harper declined and began to walk away. Harper had no legal obligation to provide any information to Cross. Unless Cross had reasonable and probable grounds to believe that Harper had committed an indictable offence, he had no power to arrest or detain him.

Since Cross had neither reasonable nor probable grounds to believe that Harper had committed an offence, Cross' detention of Harper was inappropriate.

During his testimony, Cross initially suggested that Harper had jumped him or hit him and knocked him to the ground. As his testimony continued, we learned that it was Cross who had grabbed hold of Harper. Even though Harper shoved Cross, it was Cross who pulled Harper down on top of him. This sequence of events contradicted not only what Cross had said earlier but many of the statements made by Cross to other police officers.

It is impossible to know with certainty exactly what happened after the men landed on the ground. We do not know how Cross' gun came out of its holster or how it came to be fired. All the evidence given by Cross suggested that when he approached Harper in the street, his gun was not drawn and that he did not draw it voluntarily, but that it was removed from the holster through the efforts of Harper. As well, he suggested that he did not pull the trigger voluntarily and shoot Harper but, rather, that the gun discharged accidentally.

Cross acknowledged having had his finger on the trigger and having pulled it. We also know that Cross had hold of the revolver during the entire scuffle. It would be reasonable to conclude that if Harper did have any control over the revolver at such a close range, he would not have allowed it to be pointed at him, let alone be fired. We conclude that Harper never had any significant degree of control over Cross' revolver.

Cross' first remark after the shooting—"He went for my gun and I shot him"—was not given sufficient consideration in the investigation that followed. Instead, the effort to protect Cross and to shift the blame to Harper took precedence. This effort precluded any objective determination of the facts. We believe that officers collaborated in preparing their notes, that at least one set of notes was rewritten completely, and that Cross was assisted over a lengthy period of time in preparing his written statement, all of which causes us great concern. We also are troubled that one officer would advise another to "say the gun went off accidentally." We have been left with the impression that an "official version" of what happened was developed. We are satisfied that version is inaccurate.

Unfortunately, we are not able to report on exactly what did happen at each stage of the confrontation. We can, however, conclude that it was Cross, through his unnecessary approach and inappropriate attempt to detain Harper, who set in motion the chain of events which resulted in Harper's death.

CHAPTER 5

THE INVESTIGATION

Citizens must be confident that their police department will fully and objectively investigate the use of force or firearms, and disclose all relevant evidence to the proper authorities. It was suggested to us that the Winnipeg Police Department's investigation of the shooting of J.J. Harper was handled in the same manner as any other homicide investigation. That was not the case.

In this chapter we will examine some of the specific issues relating to the quality of the investigation. Among the matters we will examine are the treatment received by Cross at the scene and during his interrogation, the conduct of certain supervising officers, and the handling and testing of key pieces of evidence in the case.

At the Scene

The Treatment of Cross

Officers at the scene asked Constable Cross what had happened, but they did not question him further. They permitted Cross to retain his revolver and to return it to his holster. Most failed to record accurately the comments he did make. When Constable Hodgins approached Cross she brushed off his clothing and asked him to sit in the car with her. She subsequently could not recall all he said and she also failed to record conversations accurately. Cross was permitted to discuss the shooting with other officers at the scene. There was no attempt to separate Cross from fellow officers.

Officers have been taught how to take and preserve statements and comments for later presentation in court. The officers at this scene did not follow those usual procedures. Even when senior officers arrived, Cross continued to receive special treatment and consideration. The actions of these supervising officers warrant special examination.

The Conduct of Constable Spryszak

Const. Glen Spryszak was a 15-year veteran of the Winnipeg Police Department and a former partner of Robert Cross. On the night of J.J. Harper's death, he was performing the duties of an acting sergeant when he was assigned to go to the shooting scene as field supervisor. He was instructed to oversee the situation and to seize Cross' firearm. Spryszak never before had acted as a supervisor in a shooting and before leaving the station he was reminded to seize the constable's gun.

When he arrived at the scene at approximately 2:54 a.m., Spryszak saw Cross and Hodgins in a car with the youth, Allan. Constables Grant Eakin and Richard Poneira stood on the sidewalk next to the blood spots. Spryszak said Constables Danny Smyth, Randy Hampton and William Isaac were not there, and Douglas Hooper was just leaving.

When the first officers had arrived at the scene Cross had been holding his revolver in his hand. He then had put it back into his holster where it stayed until Spryszak asked him for it.

Spryszak testified that Cross took out his gun with two fingers on the rubber grip and handed it to him. Spryszak looked at it briefly, then put it into his own holster. He told us he saw blood on the left side and bottom of the grip, and a dry, whitish material about two inches long on the left side of the barrel. He later told Sergeant Parker that the barrel and grip were moist.

Spryszak testified that he knew what to do with the revolver, although he did not follow standard procedure on this occasion. He said that had it been a civilian's gun he would have waited for an identification officer to seize the gun. He told us it was the job of the identification personnel to examine a scene and seize exhibits because they know the techniques of preserving evidence.

When Insp. Eric Hrycyk arrived, Spryszak removed the revolver from his own holster, with two fingers away from the blood spots, and opened the cylinder. With his hand around the butt, he examined the back of the cylinder to determine how many firing pin marks were on the ammunition. One pin mark was found on one round and that round had been lined up with the barrel. The firearm then was closed, putting the spent cartridge back in line with the barrel. Spryszak put it back into his holster. Spryszak suggested to us that the gun had not touched the sides of his holster. We find this difficult to believe.

Spryszak told us he then looked for somewhere to put the gun. After removing it from his holster again, he decided to place it on a ticket book in his car. He left it on the passenger seat until he arrived at the Public Safety Building, where he placed it on a table, undid a screw to get the serial number and turned it over to Const. William Kehler, the armaments officer.

When testifying before us, Spryszak could not recall what training in exhibit handling he had received. He told us he was not taught how to handle or transport a gun that was an exhibit. However, he could recall officers being told to treat evidence very carefully with a minimum of handling. He had taken the crime investigators' course but could not recall specifics. He said there was no direction in the department's procedures manual on how to pick up a gun but said it was common sense to touch only the rough part. It was pointed out to us that the necessity of preserving the condition of a firearm was part of the Sergeant 2 exam Spryszak had taken and passed. Spryszak said that he had not been instructed to seize Cross' holster and did not even consider doing so, feeling it would be secure with Cross.

Spryszak also neglected to question Cross adequately. He admits that had Cross been a civilian he would not have instructed him to sit with Hodgins. Had it been a civilian shooting, he would have isolated Cross and would have written down what Cross said about the shooting incident. Spryszak did not think it important in this case to write down what Cross or anyone else said at the scene. He did tell us that he attempted to keep everyone's conversation to a minimum as he was aware there would be an investigation.

He told Cross to sit in the car so there would not be any idle or undue conversation. Yet, he allowed Hodgins to sit with him. He then spoke to Eakin and Poneira, who told him of the chase and shooting, but he told us he could not recall that conversation.

When Inspector Hrycyk arrived several minutes later, he instructed Spryszak to take charge of the scene, to canvass the surrounding houses for witnesses and to tape the area to limit access to the scene. Spryszak told us he assisted Const. Craig Boan in taking photographs and blood samples. Spryszak told us that since he believed it was not his duty to examine the area, he did not do so and did not know if anyone else did. He was unaware that Harper's glasses had been knocked off in the struggle and had not been found.

Spryszak's canvass was inadequate. He reported going to only six houses. At four of these he got no answer. At one, the occupants were sleeping and had heard nothing, and at another, a woman told him that she had heard a banging on her house and had seen someone in her yard. He failed to indicate the need for further canvassing to superior officers.

Spryszak was not trained properly and was ill-equipped to be in charge of a fatal shooting scene. Some of the fault must lie with others for placing him in this position of responsibility on the night in question.

To summarize the deficiencies in his conduct:

- He failed to handle Cross' gun properly.
- He failed to seize Cross' holster.
- He failed to secure Cross' person.
- He failed to isolate all officers from each other when questioning them as to what happened.
- He failed to question Cross in isolation from his partner.

- He failed to conduct a proper canvass of the area at the time or subsequently.
- He failed to search the area of the shooting properly, following completion of the identification officer's work, to ensure that all evidence had been secured.
- He failed to question the civilian witnesses, Pruden or the youth, Allan, as to what if anything they had seen or heard of Harper's death.
- He failed to instruct the constables at the scene properly as to the seriousness of the investigation, and the need to maintain a professional approach and attitude.
- He failed to maintain proper notes of his activities and of the activities of others at the scene. In particular, he failed to make any notes of his initial conversations with officers at the scene.

Despite these errors, Inspector Hrycyk later reported to Chief Stephen that "all officers at the scene acted in a professional, competent manner."

It is our conclusion that Spryszak did not perform the duties of a supervisor in a competent manner. Some of that was due to his own poor judgment. However, much of the blame for these failings must rest with the police department and its procedures and training.

The Conduct of Inspector Hrycyk

Insp. Eric Hrycyk was in charge of all police officers and divisions in the City of Winnipeg Police Department during the early morning of March 9, 1988. As the senior officer in charge of the police department that evening, his responsibility was to remain at the Public Safety Building and monitor events of the night.

Hrycyk indicated that he was in the radio room at the Public Safety Building when the initial calls about the car chase came in and that he monitored what went on over the radio. After hearing about the shooting and the need for a street supervisor, Hrycyk decided to go to the scene. By the time he arrived, he was in possession of most of the facts. He arrived minutes after Spryszak, at approximately 3:02 a.m., and remained for about 20 minutes.

Seven officers were present when he arrived: Constables Graeme McGinnis, Brian Barker, Grant Eakin, Richard Poneira, Cross, Hodgins and Spryszak. Hrycyk spoke with all officers in one group, with the exception of Hodgins and Cross. Hodgins and Cross remained in or near their vehicle, while Hrycyk spoke with the others. Most of the information he derived from the group came from Eakin.

Hrycyk testified that he spoke with Spryszak, who opened his jacket to reveal Cross' revolver. He stated that he told Spryszak to hold onto the gun and to give it to the armaments officer, Constable Kehler, later in the morning. He said the fact that Spryszak was carrying it in his holster caused him some concern, but he did not consider it important enough to mention. He did not direct Spryszak as to the proper method of handling a revolver in a shooting, nor did he instruct him to handle the

revolver more carefully or in any other manner to prevent further mishandling. Hrycyk testified that it never dawned on him to seize Cross' holster. He told us he never stated that the gun should be preserved for fingerprinting. He testified at the inquest that he did not think it advisable to have the gun or holster fingerprinted.

Hrycyk repeated in testimony essentially the same story related to us by Cross. Hrycyk was unable to state verbatim what Cross had said, but testified mainly from notes he made at the scene and later in his vehicle. Hrycyk admitted that he did not consider Cross a suspect with respect to any improper actions.

Hrycyk told Cross not to clean up and instructed Hodgins to drive to the Public Safety Building and wait in his office. He also instructed that Pruden and Allan be taken to the Public Safety Building.

Hrycyk told Eakin, Poneira and Spryszak to remain at the scene, to check the area for evidence and to point out everything to the Identification Unit upon its arrival. They were instructed to barrier-tape the scene and keep it secure. He instructed Spryszak to canvass houses on the south side of Logan Avenue, beginning with the houses directly across the street. He indicated that he told Spryszak to be sure to canvass the houses on Alexander Avenue which might have had a view of the scene. Hrycyk indicated in his evidence that he had assumed two officers would conduct the canvass, but that he gave no specific instructions to that effect. He said, "I assumed common sense would prevail on which houses." Hrycyk agreed on cross-examination that the canvass done by Spryszak was inadequate.

Hrycyk then left for the Health Sciences Centre, where he saw Constables Hooper and Smyth. He was informed that Harper had been declared dead at 3:23 and was given Harper's identification. He instructed that Harper's body be secured and his clothing seized. He also instructed both officers to make notes about events. Hrycyk indicated that he told Hooper and Smyth to notify the Harper family, but that he was unaware of what efforts they made to do that. He also was unaware that it was not until 9:30 that morning that the Harper family was notified by officers Allan Cameron and Bill Rautavuori.

Upon returning to the Public Safety Building, Hrycyk unlocked the detective office and had the patrol officers place their detainees, Pruden and the youth, in two separate offices. He spoke to Cross and Hodgins once again and advised them of Harper's death. At that time, he again observed that Cross' jacket was soiled and that he had blood on both pant legs. He noted that Cross' left rubber boot was bloody and indicated that Cross pointed out blood spatters on his left leg underneath his pant leg from his socks to his knee. He indicated that he did not arrange for photographs to be taken but he later passed the information on to Staff Sgt. Angus Anderson of Crime Division. Hrycyk did not give instructions that Cross' boot be examined for gunpowder residue, nor did he instruct fingernail scrapings to be done of either Cross or Harper.

Hrycyk notified Staff Sergeant Anderson, Sgt. Henry Williams and Const. Calvin Osborne of Crime Division, who then came to the Public Safety Building. Hrycyk indicated that they requested that Acting Insp. Kenneth Dowson also be called. Hrycyk next contacted the duty executive officer, Supt. McDougall Allen, and phoned Chief Herb Stephen. He also contacted the officer in charge of the Post Incident Trauma Unit.

Hrycyk briefed Staff Sgt. Norm Wickdahl (who had been called by Hodgins to act as adviser to Cross), Staff Sergeant Anderson and Superintendent Allen upon their arrival.

Although he stated in his special report that "all officers acted in a professional, competent manner," Hrycyk agreed that some officers had made bad decisions and that work was done incompetently.

In summary, the actions of Hrycyk in this investigation have caused us concern and warrant comment:

- He failed to interview the officers at the scene separately, something he would have done had he been interviewing witnesses in the case of a civilian shooting.
- He failed to indicate to Spryszak that he was mishandling what would be considered crucial evidence in any ordinary investigation. He also neglected to instruct Spryszak on the proper handling of the weapon or to take control of the weapon himself.
- He failed to make proper notes of his conversations at the scene. He also failed to instruct other officers to write down verbatim what Cross had said or other conversations that may have been important, when he instructed them to make notes on their actions and observations. Although it is not common practice to record conversations between police officers and such conversations may have been considered hearsay evidence by various officers who testified, we are of the opinion that officers involved in police shooting investigations should be required to record accurately conversations they have with other officers who may be witnesses or have information crucial to the investigation.
- He failed to follow up the activities of officers whom he had instructed to carry out various aspects of the investigation. He was unaware of whether some of his instructions were completed and made no effort to ensure that his instructions were followed.
- He informed Chief Herb Stephen that "all officers acted in a professional and competent manner," without having analysed fully or critically what each did.

WE RECOMMEND THAT:

- Officers involved in shootings be handled and investigated in the same manner as any suspect in a regular homicide.
- Officers be trained to handle a fellow officer as an ordinary suspect in a homicide investigation and to proceed as though the officer may have improperly caused the injury or death.

- Officers involved in shootings be isolated immediately from all officers, including senior officers, until formally interviewed.
- Officers be instructed not to handle their revolvers if the officers are involved in a shooting. The first officer on the scene will seize and protect the weapon and holster involved at the first opportunity.
- All statements made by an officer involved in a shooting be recorded immediately and accurately.
- As a precautionary measure, officers involved in shootings be cautioned and read their rights.

Was Cross Told to Portray the Shooting as an Accident?

Allan told the inquest that after Cross returned to the patrol car and spoke with Hodgins about the shooting, another, older officer pulled up alongside. Cross got out of the cruiser and went to speak with the officer. According to Allan's testimony at the inquest, when Cross returned to the police car and opened the door, he heard this older officer say to Cross, "You just say that." Cross replied, "I will say that." At the Inquiry, Allan testified that he heard the older officer say to Cross, "Don't say nothing."

Allan also said that someone at the scene told Cross to "say the gun went off accidentally." However, when Allan attempted to include this remark in his statement, it was greeted with disinterest or extreme carelessness by officers who interviewed him several days later at his home. They recorded his comment as "see the gun went off accidentally."

We are satisfied that Allan did hear police officers tell Cross to "say the gun went off accidentally" and to "say nothing."

Officers' Notebooks

The recording of events at the scene of the shooting of J.J. Harper was handled poorly by Winnipeg police officers. Notes were not taken properly at the scene. In some cases officers subsequently supplemented their notes after discussing events with others or listening to the recorded radio transmissions. Officers seem to have written their notes so as to best support Cross' version of events and in at least one instance a police notebook subsequently was altered. There seems to have been little effort to record objectively what happened that night.

Constable Hodgins made notes about what the youth, Allan, said on a scratch pad rather than in her notebook. She told us that she had lost those notes and had no idea where they were. Further, Hodgins confirmed that the contents of her notebook were constructed later from other sources, such as the recorded radio transmissions and with the assistance of others, and not just from her own observations and recollection.

Const. Grant Eakin wrote some of his notes at the scene, discussed the incident with his partner, and finished his notes and special report later that morning. In attempting to

explain the inconsistencies between his account and what he put into his report, he told us that it was because he made them at two different times, but could not say which he wrote first. Although it emerged that he and his partner worked on their notes at the scene for an hour, he still would not say his notes were written first, only that both were done before he went home. He did admit that there probably was discussion with others as his notes were being written.

Eakin's partner, Const. Richard Poneira, admitted that he failed to record Cross' account of the shooting. Even though he began his notes at the scene and completed them a short time after at the Public Safety Building, he said he could not recall verbatim conversations.

In his notes Poneira also recorded an inexplicable description of the victim. Although he had seen Harper up close while administering first aid to him, Poneira described him as being in his late 20s and wearing a black leather jacket, rather than in his 30s and wearing a black cloth jacket. He told us that he did not do so to corroborate Cross' story and told us he had not been directed on how to make the notes.

Poneira could remember very little about events of that evening and almost nothing of any conversations that took place. We find it difficult to understand how an officer could ignore his training and proper procedures and fail to record an explanation of the events of a shooting death.

Const. William Isaac testified at the Inquiry that he had copied all his notes from his original notebook into a new one, making a number of changes and leaving out the reference to the handcuffing of Pruden. He told us he apparently prepared a second notebook on March 17, although he could not recall doing it and so could not say what his reasons were for doing this. He did tell us that he altered his notebooks after certain errors in his written reports were pointed out to him by a senior officer.

Isaac testified that he had given evidence at the inquest from a false set of notes. The most important piece of evidence which he changed was the reference to the radio report of the type of clothing being worn by Pruden. He had stated in his original set of notes that the radio report referred to the suspect's jacket as being "grey," whereas in the revised set he had written that Pruden's clothing was reported as "black." The difference is significant because Harper was wearing black clothing. The radio report we heard stated "dark clothing." Both Pruden and Harper arguably had dark clothing (Harper's was black, Pruden's was grey), but the discovery of what Isaac had done contributed to the persistent feeling that the police officers on duty that night had engaged in an effort to shade the evidence to favour Cross' version.

Isaac agreed that leaving the entry as "grey" might have been detrimental to Cross' position but denied any ulterior motivation. He remembered someone pointing out that he had made a mistake in his reports but could not recall who that was. We doubt his veracity on this point. We believe he knew and that he chose to protect that person. Such a sense of misplaced loyalty is unfortunate and is below the standard expected of police officers.

Isaac admitted he made a mistake in rewriting his entire notebook and making several changes to the contents. He stated that he should have noted any corrections at

the end of his notebook with an arrow instead of rewriting his entire notebook. When he was asked initially to produce his notebook for the Inquiry in July 1989, he stated that he could not recall having rewritten his original notebook. As with all other officers involved in the case, Isaac did produce a notebook when subpoenaed to do so by the Inquiry, after the subpoena was confirmed by the Court of Appeal. However, he did not comply properly with the subpoena. The notebook which he produced for examination by Commission counsel under subpoena was the rewritten one and not the original. He also gave inaccurate evidence at the inquest when he stated in response to a question from Judge Enns that the notes he used to assist him in his testimony were made at the time or shortly after the events which they described. He told us he had only just discovered the first notebook a few days before appearing at the Inquiry and immediately brought it to the attention of his superior, and then to the attention of counsel for the police association, who advised Commission counsel.

Isaac told us that he had offered to resign because of his actions. He apologized for his mistake and for any embarrassment it may have caused. This officer was honest in bringing the matter to light and should be commended for doing so. On the other hand, what he did puts his testimony before us and before the inquest in doubt, and raises concerns as to the manner in which police officers are allowed to use their notebooks, both in the course of their work and in the course of giving evidence at trial.

In his testimony before us Chief Herb Stephen agreed that there was nothing to prevent officers from comparing notebooks and exchanging information about the description of the suspect.

Some broader questions arise from the Harper case about the use of officers' notebooks in court. At present, officers are permitted to look at notes when giving evidence to refresh their memories, if judges are satisfied that the notes were made at the same time that events took place, or shortly thereafter. It is assumed by the court that notes taken about the time of an offence will record accurately what officers saw or heard. If notes are not made until some time later, officers may not be permitted to refer to them, and if they are permitted to refer to them, this might have an impact on the weight given to their evidence.

During the Inquiry we were dismayed to learn that many notes do not represent an officer's own recorded memory of events. We were told that officers often talk to their partners to obtain or clarify information. They regularly check the record of radio communications to obtain times that various events happened or were reported. While this practice may improve the accuracy of an overall record, it also means that the notes do not represent an officer's own recollection. The manner in which notes now are assembled is not "notes" in the accepted sense. It would appear to be the case that if two officers have a difference in recollection of what they saw or heard, one of them changes his or her notes so both sets of notes correspond, or at least do not conflict. This is a far cry from what we believe most judges think about how an officer's notes are prepared.

Some surprising views emerged when we were considering the issue of notebooks. Apparently, the Winnipeg Police Association took the position that the

notebooks are and remain the property of individual officers. The Chief of Police felt that the books are the property of the police department. We agree with the Chief. But we believe that despite whoever "owns" the books or the notes, procedures have to be put in place that will restore the confidence of the public and the judiciary in the integrity of notebooks and note-taking.

The Toronto Police Department employs much more stringent rules on the use of notebooks than its Winnipeg counterpart. Every notebook bears the officer's name and badge number, the date the book was started and the date it was completed. Each notebook and all the pages in it are numbered.

When officers come on duty they pick up their notebooks from their pigeonholes along with their weapons. Notes that are made must be original and not transferred from other sources such as scratch pads. All entries into the notebooks must be in black pen. No erasures are allowed. If a mistake is made the officer must use one strikethrough line, initial the error and add the correction. No blank spaces, lines or pages are permitted. A notebook must be completed before a new one is started.

When officers go off duty they note the time in their books, sign the books and turn them in to the staff sergeant, who reviews them, countersigns them and returns them to the officers' pigeonholes. All notebooks stay in the detachment where officers are stationed. If officers are transferred to another district, their notebooks go with them. Upon retirement the notebooks remain the property of the department.

We believe that similar policies on notebook management should be adopted in Manitoba. In our opinion the notes that are recorded should record only the individual recollection of each officer. Notes should be prepared independently. If only approximate times can be recorded, so be it. More specific times can be obtained from the print-out of radio communications if that is necessary, but they should not be entered in the notebook as part of an officer's recollection. In the alternative, it would be proper for an officer to prepare his or her notes of what happened and append a note that he or she later examined the communications records, and then record in the notes what that examination revealed.

WE RECOMMEND THAT:

- Notebook management practices similar to those used in Toronto be adopted by the Winnipeg Police Department.
- Police training and procedures manuals be altered to reflect the importance of officers preparing notes based only on their own recollection.
- Regulations be amended so that notebooks are not destroyed for 25 years.

The Interrogation

Taking Cross' Statement

Sgt. Henry Williams is a member of the City of Winnipeg Police Department's Crime Division, with over 20 years' experience in investigating major crimes. Along with Const. Calvin Osborne, he was called upon to interview Cross at the Public Safety Building. When Williams arrived he found Cross waiting for him in the office of the duty inspector. Williams and Osborne questioned Cross in the presence of Staff Sgt. Norm Wickdahl, who was there on behalf of the Winnipeg Police Association to safeguard Cross' interests.

Williams admitted that he "advised" Cross to begin to make notes of the incident in a new notebook. After interviewing Cross, Williams seized his jacket, pants and boots, but failed to have photographs taken of the blood stains and other marks that appeared on them. Nor did Williams order photos of the stains on Cross' body, such as the blood on his left leg and what Williams felt were powder markings on his hands.

The questioning apparently began at around 5:20 a.m. and continued until shortly before 9:00 a.m., although Cross said that he thought the questioning started much earlier at about 3:30 and lasted three to five hours. He said that he felt under considerable pressure to recall matters of detail.

Cross said that he was asked, "Where were your hands? Where were you standing?" and so on. He was questioned repeatedly about matters of which he had only a vague recollection. It is clear that he could not recall minute details of what had occurred.

Yet, in the statement taken by Williams, many minor details are itemized. When questioned as to the manner in which Cross was questioned, Williams stated that Cross gave one long flowing narrative (as the statement itself appears to be) and further, that everything that was said to and by Cross was in the statement. Williams testified that he never questioned Cross, nor did he ask him for any further explanations. Cross himself contradicted Williams' testimony. The statement is only six handwritten pages long, and if it had been recorded from Cross' narrative it would not have taken three and one-half hours to record.

Cross testified that he attempted to give a simple explanation, which Williams found unacceptable. Cross said that Williams felt his explanation was not detailed sufficiently and demanded further elaboration.

The discrepancy between the evidence of Cross and Williams as to the taking of the statement caused us to consider carefully how to view its contents. It is significant that the statement provided great detail about an event that could have lasted only a few seconds. During the struggle Cross' concern could not have been to record mentally what was occurring. It also is significant that nowhere in the statement did Cross indicate the same sense of responsibility which he had communicated earlier to Smyth and Hooper when he said, "He went for my gun and I shot him."

The statement is all the more remarkable because of its detailed story which places all blame on Harper and none on Cross. It is also a remarkable document because, while it flows like one long narrative, it could have resulted only from a

lengthy conversation between Williams and Cross, the content of which was not disclosed to us. We believe that Sergeant Williams did not record all that was said and he did not question Cross with any degree of skepticism. We conclude that he was sympathetic to Cross' situation from the outset and assisted Cross in describing a scenario which put Cross in the best possible light. Williams then put that scenario into writing. We find that Williams and other officers assisted Cross in carefully constructing his statement, ensuring that nothing was recorded that might jeopardize him in any way.

As Williams himself admitted, Cross was not handled as a suspect in a normal homicide investigation. We would have expected that the usual investigative procedures would have been followed.

Recording Interrogations

The manner in which Cross was interrogated demonstrates the need for improved procedures for taking statements. Given the seriousness of any police shooting, the entire interview should have been videotaped, or at least tape-recorded. We believe that better records must be kept of all that is said during such interrogations.

Chief Stephen told us that one of the four interview rooms at the Public Safety Building was being equipped with video-recording equipment. We commend this beginning and expect that this process now has been completed.

It is strange that the police have not made more use of the tape-recording of statements. Its use has been approved by the courts.[1] In an unreported decision of the Manitoba Court of Queen's Bench (May 10, 1978), *R. v. Osborne*, the City of Winnipeg was urged to tape statements, a suggestion which was reinforced by the recommendations of the Manitoba Police Commission, Frampton Inquiry Report, July 31, 1979. These suggestions obviously went unheeded.

The subject is dealt with in Salhany's 4th edition of *The Police Manual of Arrest & Interrogation*. It states at p. 158–160:

> The advantage in using a tape recording is that the court will have the opportunity of hearing the accused's voice and thus may be able to assess from its tone and pitch his state of mind. However, the police officer must remember that the tape will record only the conversation which took place.
>
> The court must still be satisfied that there were no threats or inducements to the accused prior to the taking of the statement.
>
> Another advantage is that it will be easier to establish that the accused did indeed make the statement if he later decides to deny doing so. A further advantage is that all of the words spoken by the accused will be recorded rather than only those which the officer was able to take down during the questioning.

In Ontario, the Halton police established a project between 1985 and 1987 involving the audio-visual interviewing of suspects and accused persons for all

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1 *R. v. Colpitts*, [1966] 47 C.R. 175 (S.C. C.).

Criminal Code and federal statute offences, excluding drinking and driving offences. The videotaping removed the possibility of allegations of police misconduct in taking statements. It also showed that suspects were not reluctant to speak in front of a camera. More than two out of three people who had their statements videotaped made confessions or admissions.

The Law Reform Commission of Canada, in its review of the Halton project, found that videotaping helped police in gathering evidence and at the same time added to the protection of the rights of the accused.[2]

WE RECOMMEND THAT:

- All statements taken by police officers be either audio- or video-recorded. If the contents of a transcribed statement are challenged, or some tribunal wishes to hear how certain words were expressed, the tape or video can be played.
- Video equipment be used to record the statements of all suspects in cases involving deaths and other serious cases. We suggest that the taping record the totality of each interview, including all introductory comments and explanations and warnings given by the police, and including any formal statement or other comments that result.

  The videotape will be of great value. The impact would be reduced if accused persons could allege that promises or inducements were offered or pressure was applied to them before the taping began.
- Where video equipment is not available, all statements be audio-recorded. The RCMP has tape-recorded some statements for years. We recommend that all police make that practice mandatory in all cases, with the use of video where statements are taken in an office with that equipment.

Inadequate Questioning of Witnesses

We have commented already on the failure of any of the investigators to question properly either Melvin Pruden or the youth on the night of the shooting. Both Pruden and Allan were as close as most officers when a shot was heard. The youth was

2 Joyce Miller, "The audio-visual taping of police interviews with suspects and accused persons by Halton Regional Police Force: an evaluation " (Ottawa: Law Reform Commission of Canada, 1988).

later in the car with Cross and overheard an important conversation. We cannot imagine the police's neglecting such witnesses in any other case.

The youth testified that he later told officers what he heard at the scene. He said they were not interested. Allan testified that in giving his statement he intended to say that someone said, "Say the gun went off accidentally." He explained that the police officer taking his statement apparently wrote down "see" instead of "say" so that his statement, which was introduced at the inquest and before us, read, "See the gun went off accidentally." This latter version makes no sense in this context, whereas the former does. The error made in taking the boy's statement adds to our concern about how the investigation was conducted.

Kathryn Hodgins, Cross' partner, was not questioned properly, either. She was not separated from Cross at the scene or for a long time afterward. The partners were permitted to discuss the incident prior to either of them making statements. Hodgins was not questioned as a partner of a civilian would have been if they were involved in a shooting.

None of the officers at the scene except for Cross was interviewed. Their written reports formed the basis of the investigators' "investigation."

The Notification of the Family

The evidence shows that the Harper family was not notified of the shooting until about 9:30 a.m., about seven hours after it had occurred.

Inspector Hrycyk testified that when he arrived at the Health Sciences Centre he was informed that Harper had died at 3:23 a.m. Hrycyk then instructed Constables Hooper and Smyth to notify the Harper family. He told us that he was unaware of what efforts they made to do that. He also was unaware that it was not until 9:30 that Lois Harper was notified by officers Allan Cameron and Bill Rautavuori. The delay can be explained by Harper's having identification which showed two different addresses. The police chose the wrong address in their attempt to trace Harper's next-of-kin.

More disturbing than the delay in notifying Harper's family is the insensitive manner in which that notification was handled. Judging by Cameron's report (Exhibit 72), much of his time with Lois Harper and her sister was spent eliciting information about Harper's drinking habits and the effects it had on his behaviour.

The Handling of the Evidence

The Winnipeg Police Department has specific regulations on the gathering of evidence:

EVIDENCE: GATHERING

I. General

Real evidence submitted in Court must satisfy the Court, that:

1. The evidence is relevant to the case.
2. The evidence is in the same condition as when the offence took place or when taken into possession.
3. The evidence has been, and can be identified.
4. The continuity for handling the evidence can be proven.
5. The oral evidence in conjunction with real evidence agrees with the facts surrounding the real evidence.

II. Responsibility For Seizure

Police officers attending an incident are responsible for the seizure of all evidence, with the following exceptions:

A. In major incidents such as murders, attempt murders or sexual assaults where the Identification Unit will be attending, the primary unit officers will ensure all evidence is properly secured/protected and will collect all evidence which may be damaged or destroyed prior to the arrival of the Identification Unit.

B. When the Identification Officer attends he will confer with the investigating and attending officers and a decision will be made as to who will be responsible for the collection of evidence. The degree to which the Identification Unit is involved in the investigation will be a factor in determining whether the Identification Unit or the investigating officers seize and process the exhibits.

C. When the attending officers are in doubt concerning evidence or the seizure of same, they must protect or secure the scene/article and shall immediately consult with their supervisor for direction.

III. Handling Exhibits

A. Officers must never mix exhibits.

B. When marked exhibits are turned over to the investigator in charge of exhibits and they are already sealed in plastic then the investigator is only required to mark the plastic container. If the exhibit is not sealed then he should also mark the exhibit itself with his initials and the date he received it.

C. Once exhibits are marked they can be placed into their individual plastic bags and sealed with tape.

D. When possible, exhibits should be taken to the Crime Detection Laboratory without delay. If for some reason this is not possible, there is a refrigerator located in the Stores Unit where blood and other perishable exhibits may be kept. (Exhibit 56)

At the Scene

Sgt. Robert Parker and Const. Craig Boan of the Identification Unit arrived at the scene at about 3:30 a.m. Boan dusted the stolen vehicle for fingerprints, conducted a search of the scene to collect physical evidence and photographed the area. He assisted Parker in measuring the area. They noted that the scene had been disturbed considerably by the police officers and ambulance attendants who had been there previously. On the authorization of Supt. McDougall Allen and Staff Sgt. Angus Anderson, who were both there, the Fire Department was called out to wash down the scene at approximately 6:00 a.m., before Parker and Boan left. This was before a complete examination had been conducted. Boan returned at 3:00 p.m. to take photographs under daylight conditions and to search for anything that may have been missed earlier.

One reason given by the police for clearing the scene so quickly was the possibility that children might see blood on the sidewalk. This was not, in our view, an adequate reason, considering that the scene was not searched thoroughly for evidence before it was washed down. There was no need to clear the scene so soon. Chief Herb Stephen testified that following this incident, departmental policy was changed so that shooting scenes will not be cleared until a daylight examination is completed.

The casual nature of the police search of the scene resulted in the failure to find Harper's glasses. Darryl Sterdan, a reporter for the *Winnipeg Sun*, located them at about 1:00 p.m. on the day of the shooting. He found them in four pieces at the scene, on the south side of a tree and eight feet north of the blood spots on the sidewalk. Parker admits he must have missed the glasses in his examination of the scene.

The Later Handling of Evidence

There also were problems with the manner in which physical evidence was dealt with in subsequent stages of the investigation. Through a combination of poor decisions and improper handling of evidence, the Winnipeg police passed up opportunities to test Cross' story properly. To understand the instances where this happened, we must review the sequence of the forensic investigation.

After J.J. Harper was declared dead, his body was placed in a sealed morgue locker at the Health Sciences Centre. Constables Smyth and Hooper retained the key to the locker and later turned it over to Sergeant Parker.

On the morning of March 9, Chief Medical Examiner Dr. Peter Markesteyn performed an autopsy. Parker, Boan and Const. Kerry Armit of the Winnipeg police, and Staff Sgt. Ken Derendorf and Bruce Kramarchuk of the RCMP also were in attendance. Boan took photographs of the body at the morgue and during the autopsy. Markesteyn, Derendorf and Parker discussed conducting a test to determine whether some blue marks on Harper's hands indicated the presence of gunshot residue. According to Parker, Derendorf informed them that use of the test had been suspended. It was suggested that a portion of tissue be excised so that it could be analysed later if a suitable test became available. However, after some discussion Markesteyn decided not to take the tissue sample.

Although hair samples were taken from both Harper and Cross, Parker felt that it was unnecessary to take fingernail scrapings from either man. Boan testified that for some time it had not been standard procedure to do fingernail scrapings in such circumstances. He said the Identification Unit usually only examines nails in cases of sexual assault or in cases in which one party has been scratched. Fingernail scrapings and tests of substances on the hands of Harper and Cross would, it seems to us, have been equally or more important in this case.

Little conclusive information was gained from the examination of Harper's clothing. Constable Smyth received Harper's boots, pants and underwear while waiting in the "police room" at the Health Sciences Centre. The staff of the emergency ward later gave him Harper's jacket, shirt and the rest of his personal belongings, all stuffed into one bag. He turned these items over to Const. Kerry Armit at approximately 7:30 that morning and together they went through them. Boan photographed Harper's clothing, although not his boots. He described the shirt as having a discoloured grey area, which appeared to have powder adhering to it below the bullet hole in the front left side.

Bruce Kramarchuk of the Firearms Section of the Winnipeg RCMP forensics lab tested Harper's jacket and shirt to determine the distance from which the fatal bullet was fired. Kramarchuk testified at the inquest that he believed that the muzzle of the revolver was less than an inch away from Harper's shirt (or chest) when it was fired, and that most of the residue from the bullet went through the shirt and into an area between the shirt and chest, with additional residue being left on the outside of Harper's clothing. He felt the blood covered any further residue.

Commission counsel asked the RCMP Central Forensic Laboratory in Ottawa to test Harper's clothing for gunshot residue. However, RCMP technician Murray Smith testified that he was unable to perform the analysis because Harper's jacket and shirt had too much blood on them.

The collection and preservation of Cross' clothing was done in a haphazard and unprofessional manner. It was not until March 10 that Boan was instructed to photograph Cross' jacket, after Parker noticed it hanging at the Public Safety Building.

Boan described Cross' clothing as having blood below the right jacket pocket, and on the bottom right sleeve. There was also blood below the right knee on the front of his pants. The top left shoulder of the jacket and seat of the pants both were covered in dirt. Armit testified at the inquest that he observed dirt below the right knee and along the right side of the knee area. Armit also described white-coloured stains, possibly salt, above the knee of the right pant leg. He also noticed the same type of staining on the right leg between the knee and the thigh area, and on the left leg, on the left hip and rear area. On the left boot Armit observed a large bloodstained area from the toe around to the right inside area of the ankle, and general staining. He said that both boots had fine sand adhering to the soles.

We find it odd that Parker and the senior investigating officers failed to give instructions to have Cross' boot examined for gunpowder residue in light of Cross' version of events. If anything, powder residue on his boot would support his statement that his foot was against Harper's chest when the gun fired.

Murray Smith of the RCMP also was requested by Commission counsel to test Cross' pants and boots for gunshot residue. Because Cross' pants and boots were packed badly, having been thrown together in one bag, Smith was reluctant to test the clothing. He was concerned that residue might have been transferred from one leg to the other. When this did not appear to be the case, he concluded that because of the hard impact of residue onto the pants, it was not easily rubbed off. His examination indicated a close firing range of less than three feet. The residue also indicated that the left leg and foot were exposed to a muzzle blast or barrel cylinder gap blast of the revolver. Smith's testing served to substantiate Cross' description of having his foot pushing up against Harper's chest at the time the revolver was fired.

Cross' service revolver should have been a key piece of evidence in the investigation of the shooting. According to Cross, Harper had hold of the gun's barrel and was trying to wrest control of the weapon away from him. Obviously, any information that could be gleaned from examining the gun would have been important in evaluating Cross' account of events.

Unfortunately, as we already have seen, the gun was mishandled badly by Spryszak at the scene of the shooting. It is, of course, impossible to know what fingerprint or other evidence would have been found if the gun had been handled properly, but police decided at an early stage not to even try to fingerprint it.

It was Sgt. Robert Parker of the Identification Unit who made the decision at the scene that the revolver would not be fingerprinted. He told us:

> I couldn't have fingerprinted it at the time I was at the scene. The methods which would be recommended for fingerprinting that we had available weren't available to me at the scene.
>
> Secondly, ... there was wet blood on the gun, that there was indication of water marks on the gun. If the gun wasn't totally dry, if there's wet blood on it, it's not going to be examined. (p. 1801)

Parker also did nothing to investigate the blood and water marks on the gun, and did not request that the revolver be photographed. He told us that part of the reason for his decision not to fingerprint the gun lay in Spryszak's description of how he had handled it. Parker felt, because of that, there was little likelihood of finding meaningful prints on the gun. It is noteworthy, we believe, that this rationale never was related to Judge Enns during the inquest. Parker used it for the first time when he testified before us. At the inquest, Parker simply said that the decision not to fingerprint the gun was made because in his view any evidence of fingerprints on the gun would have been inconclusive. Clearly, that rationale was incorrect.

Parker further related that, in consultation with his superior, Sergeant Bellingham, he decided that a range determination test should be done on Cross' revolver instead of fingerprinting. This involved, among other things, he said, examining the inside of the revolver's muzzle for clothing fragments as well as firing the weapon and observing the impact pattern of the powder and blast. The test was to be conducted at

the Winnipeg RCMP forensic lab. It was felt that the range determination test was more important than fingerprinting the weapon and it was believed that doing the range test would preclude checking for prints.

Parker said,

> The bottom line that I'm trying to say is that we placed a lot more priority on range determination. That was the only thing that could really prove or disprove the sequence of events. (p. 1783)

Parker said that fingerprinting would have limited the potential for range determination testing by destroying residues and powders inside the barrel of the weapon. Parker said he received no instructions not to print the gun, that it was up to him. He stated, "I'll take full responsibility for not having the gun printed."

We note at this point that when the gun was sent for the range determination test the next day, no request was made by Parker to have the inside of the barrel checked for clothing fibres. We think that such a request would have been made if he thought it so significant. Technicians at the RCMP lab apparently just test-fired the gun to determine the impact pattern of the barrel blast. From that, the RCMP apparently were able to conclude how far the gun barrel was away from the point of entry of the bullet. Faced with that evidence, Parker admitted to us that both the range determination test and the fingerprinting of the gun could have been carried out.

Constable Boan testified that he had thought that it would have been helpful to conduct a fingerprint examination of the revolver to determine whether or not Harper's fingerprints appeared on it. Parker ordered him not to conduct such an examination. Boan stated he believed that Parker had done so after consulting with other officers and that, "what superior officers decide, will be done."

One week later on March 16, Boan was, in fact, directed to fingerprint the revolver and did so at the RCMP lab. Only one identifiable print was found, that of an RCMP officer who had inspected the gun.

Parker ended his testimony to us by saying:

> We realize that the fingerprinting of the gun is in fact perhaps more important than we had initially indicated. Obviously the issue has been addressed and the policy has been changed to allow for that. (p. 1916)

We believe that it was a serious mistake not to fingerprint the gun. From the evidence before us, we are convinced that fingerprinting and range determination testing both could have been undertaken. Even if a choice did have to be made, the wrong test was chosen. It was more important to determine if there were fingerprints on the revolver.

We recognize that even if an early decision to fingerprint the weapon had been made, the results might not have disclosed any fiingerprints because of the way in which the gun had been handled. Nonetheless, it should have been done. Boan testified that, according to department policy, weapons discharged at a shooting scene

usually would be handled carefully, photographed at the scene, unloaded and placed in a paper bag or cardboard box for preservation until a decision whether to print was made. Cross' revolver, however, was handled excessively, holstered and removed at least three times, and later placed in a plastic exhibit bag, which Boan said could have smudged fingerprints or rubbed them off entirely. The decision not to fingerprint the gun clearly prevented anyone from knowing whether there were fingerprints on it, and if so, whose they were and where they were situated.

The same is true of the handling of Cross' holster. Sergeant Parker suggested that it was the interviewing officers, Williams and Osborne, who were responsible for seizing Cross' holster and deciding whether it would be fingerprinted. Parker admitted that he did not even consider having the holster examined. Neither did he request that the holster be checked for fingerprints. He did acknowledge discussing the mechanical examination of the holster with the firearms section, although he could not recall any discussion as to fingerprinting. He testified at the inquest that he had no personal knowledge as to the location of the holster and that he did not ever suggest that the holster should be fingerprinted.

Spryszak agreed that in a normal criminal investigation of a struggle involving a holstered gun, it was possible that he would seize the holster for fingerprinting. He said, however, that regulations under which he was operating at the time, concerning an officer involved in a shooting, required only that the gun be seized. He testified that he did not ask how the gun came out of Cross' holster. He reluctantly accepted that he should have considered the possibility that the holster be fingerprinted. Hrycyk also told us that he did not consider Cross a suspect in any wrongdoing and that it never dawned on him to seize the holster. We conclude that it was negligent not to have seized, protected and examined the holster and the gun for fingerprints. When he observed how Spryszak was handling the revolver, Hrycyk should have taken charge of it, holster and all, to preserve it for analysis.

Parker was not the only person responsible for the decision to forgo fingerprinting the gun and holster. Constable Boan suggested to us that the decision was made by more senior officers. We gained the impression that Parker sought direction from superior officers about fingerprinting. While Parker readily admitted that he spoke to his superior, Sergeant Bellingham, about the matter, we find it difficult to believe that investigators from Crime Division were not consulted, as well. Clearly, the matter was considered sufficiently important to have been discussed, according to Boan's testimony, "several times" that day. While we are unable to say with any degree of certainty who participated in those discussions, it is clear that the decision not to fingerprint the gun and holster precluded finding answers either to support or refute Cross' version of events.

WE RECOMMEND THAT:

- When an officer is involved in a shooting his or her revolver and holster be seized immediately, protected and preserved in a paper bag or similar receptacle by the first officer to arrive at the scene. The officers at the scene need not await the arrival of a senior officer before placing the revolver in a suitable protective container. The revolver should, as a matter of course, be fingerprinted.

The Chief's Assessment of the Handling of the Evidence

We are unimpressed with the manner in which the evidence in this case was dealt with. We believe that it was casual and negligent, and served to obscure rather than to clarify the facts of the matter.

Police Chief Herb Stephen, however, did not share our concern about the gathering of the evidence. Stephen felt that the Identification Unit had done a thorough job, with the exception of the failure to find Harper's glasses. The Chief excused that oversight by the investigators by saying, "That was an unfortunate thing, [but] ... they're not really necessary for the investigation...." He maintained that he still had confidence in the officers but that "they [the glasses] shouldn't have been missed." As a result of the officers' failing to find the glasses, new procedures subsequently were implemented, requiring preservation of the scene until after daybreak.

Stephen said that he was not involved in decision making regarding fingerprints or fingernail scrapings, since it was up to investigators to deal with those matters, but he agreed that possibly it would have been good police work to have examined them. He agreed that there might have been fibres under fingernails after two men fought over a gun. The Chief had no conversation with Parker about why he did not print the gun or take fingernail scrapings.

The Chief disagreed with Sergeant Zacharias' comment on the handling of an officer's gun in a civilian shooting. Stephen stated that he felt it was not necessary to remove it from the officer's possession until the officer arrived at the station and was out of view of the public. Stephen felt that until then the safest place for the revolver would be snapped in the officer's holster.

It was the opinion of the Chief that in none of the perceived mistakes in the handling of the evidence would a difference in handling have changed the outcome of the investigation. He felt that matters would not have been changed, even if a fingerprint had been found on the gun. Apparently, some senior members of the department disagreed with the Chief's conclusion about the effectiveness of the handling of the evidence. Acting Inspector Dowson wrote to Stephen on May 2:

> [W]ith respect to certain of the evidence I myself as well as Staff Sergeant Keatinge agreed that perhaps some criticism was warranted. The most

> glaring example ... dealt with the decision made at the time not to fingerprint the weapon issued to Constable R. Cross. (Exhibit 70)

It is disturbing that the Chief of Police would refuse to acknowledge that the gun should have been checked for fingerprints. While it is fine for the Chief to support his staff, this support cannot be unconditional. Sometimes mistakes can happen, and they certainly did in this case. We would have thought the Chief would admit to them willingly.

Supervision of the Investigation

In attempting to untangle the threads which form the cloth of the Harper investigation, a recurring question arises: Who was ultimately responsible for the investigation? The answer is more difficult to ascertain than we would have expected from an organization as hierarchical as the Winnipeg Police Department. What is clear is that the supervision was inadequate.

Const. Kathryn Hodgins, as the senior constable, should have taken charge of the scene, but did not. The first officer to take charge was Spryszak who, aside from seizing Cross' revolver, provided very little in the way of supervision. Next came Inspector Hrycyk, who was in charge of all police officers and divisions in the city on the morning of the shooting.

Hrycyk testified at the inquest that although he was in charge at the scene and instructed officers what to do, his "rule in an incident like this is not to be an investigator ... it's to allocate resources of the appropriate people at the scene, let the investigators investigate the incident."

At 4:00 a.m. Hrycyk notified Staff Sgt. Angus Anderson, Sgt. Henry Williams and Const. Calvin Osborne of Crime Division. Acting Insp. Kenneth Dowson, who was in charge of Crime Division, also was notified, as was Sergeant Parker of the Identification Unit, who in turn called Constable Boan to assist him. Hrycyk also called Supt. McDougall Allen, the duty executive officer who went to the scene at 5:45.

At 5:00 a.m. Hrycyk phoned Chief Herb Stephen and told him of the shooting and of the officers who had been called out. The Chief told Hrycyk to call him back if he was needed, otherwise he would be in at 8:00.

Although it seems it was Acting Insp. Kenneth Dowson who may have been ultimately responsible for Crime Division's investigation of the shooting, it was Staff Sgt. Angus Anderson who actually went to the scene that morning, arriving at 5:50.

There was some confusion in the evidence as to the role of Inspector Dowson. Various witnesses described Dowson as the officer in charge of the investigation. Sergeant Williams, who interrogated Cross and took his statement, said that Dowson was in charge. Stephen testified that Dowson was the officer in charge of the case, as did Inspector Hrycyk.

When Crown attorney William Morton asked for the services of a City of Winnipeg police officer to assist him at the inquest, the department assigned Dowson along with Acting Insp. Rex Keatinge.

On the morning when Inspector Dowson was scheduled to appear before the Inquiry, tragically, he took his own life. An inquest with respect to his death has been conducted by Provincial Court Judge Charles Rubin. At the time of this writing, Judge Rubin has not yet issued his report. We do not wish to engage in any discussion of the events leading up to the death of Inspector Dowson, and will refrain from expressing any opinion or conclusion as to that aspect of the Harper matter. The review by Judge Rubin will, we are sure, properly address that tragic turn of events.

As the officer whom others believed was in charge of the investigation into the death of J.J. Harper, it is possible that Dowson could have shed considerable light upon several curious aspects of the investigation. We were compelled to proceed without having heard from him, but we are satisfied that the lack of his direct testimony does not preclude us from reaching certain conclusions from all the other available evidence as to what the department did and why.

It may well be that Inspector Dowson was nominally in charge of the investigation, but lines of supervision and communication appear to have been so ineffective that no one actually took responsibility for determining all the facts of this case.

"Ultimately I am the man in charge. The buck stops with me." Those are the words of the man who has the final responsibility for the Winnipeg Police Department. Herb Stephen has been Police Chief since April 1984 and when he testified before us he had been a member of the Winnipeg police force for 33 years, mainly in the Crime Division.

The Chief admitted to us that the investigation did not appear to have been conducted with any degree of skepticism. He told us that this was not one of his department's better investigations, and it was not representative of his department's usual standard of criminal investigation.

While Chief Stephen was kept informed of the progress of the investigation from the time he was first called by Hrycyk at 5:00 a.m. on the morning of the shooting, he admitted that he never gave direction to any of the investigators on the case. More importantly, he was unable to shed any light on the question of who had made or had failed to make important decisions during the investigation. Despite what must have been obvious problems right from the outset, the Chief did not order a complete review—either internally or externally—of those decisions.

Despite Chief Stephen's apparent willingness to take ultimate responsibility, he did not appear to exercise any supervision over the investigation. It was the Chief's responsibility to see that an independent investigative approach was taken by his staff. He did not assume this responsibility. He did not even recognize there were serious deficiencies in the way the investigation was conducted. It is he who ultimately must be held accountable for the breakdown in standards and supervision which marked this investigation.

Conclusions

It is our conclusion that Cross was accorded special consideration by fellow officers at every stage of the investigation. We can only conclude that this investigation was handled as though everything had occurred as Cross stated, and that the shooting

"investigation" was done merely to corroborate and reinforce Cross' story. Both at the scene of the shooting and during the subsequent interrogation, much more attention was given to protecting Cross than was devoted to uncovering the facts of the case.

This was not an independent professional investigation. Those involved in all parts of this investigation were guided, at least to some extent, by the corporate, institutional goal of self-preservation which functioned to reach a conclusion that Cross, and therefore the department, had done no wrong.

CHAPTER 6

THE EXONERATION

The Firearms Board of Enquiry

At 8:30 a.m. on March 9—less than six hours after the shooting—a review panel was convened to begin considering the circumstances of the shooting of J.J. Harper.

The Firearms Board of Enquiry is a departmental review body, among whose terms of reference at the time of the shooting were:

1. To investigate each and every time a member of this Department discharges a firearm in the course of his/her duty.

2. To advise the Chief of Police of their findings and make any recommendations they feel are necessary.

The board was composed of chairman Acting Deputy Chief Clark Peckover; Acting Supt. Don Wardrop; Staff Insp. Graham Stewart, the Chief's executive assistant; and Const. William Kehler. The Firearms Board of Enquiry was convened on the morning of Harper's death but then was adjourned until 9:30 a.m. the following day.

Although by the time the board met the next day they had examined reports from the officers who had been at the scene, they lacked many pieces of information. There were no statements from Pruden or Allan about what they may have observed at the scene. A comprehensive canvass of neighbouring houses had not been done. The

autopsy report was not available, nor were there any reports on the analysis of the physical evidence, such as the weapon or the clothing of either Cross or Harper.

The Chief testified that he was sure the board would have received information verbally from the Crime Division investigators through Peckover. He also assumed that the board had blood and urine alcohol-level test results from the RCMP laboratory. He said that he himself was given those results only just before his press conference later that day. Nevertheless, many questions remained unanswered at the time the board made its hasty report to Stephen.

In that report, Acting Deputy Chief Clark Peckover wrote in part:

> The Firearms Enquiry Board reached a conclusion that there was no negligence on the part of Constable Cross. His conduct in this matter appears to be above reproach. The incident would appear to to have been precipitated by the assault on his person by Harper and the subsequent struggle for his service revolver which accidently [sic] discharged, killing Harper. (Exhibit 85)

At approximately 11:30 a.m. on March 10, Stephen was given Peckover's report and the reports reviewed by the board. He received no other information prior to reaching what he said were his "own conclusions" and writing on the face of Peckover's report that he concurred with the findings of the Firearms Board of Enquiry.

Stephen immediately prepared a news release and conveyed this information to the public at a news conference conducted at 3:30 that afternoon. At that time the Chief also revealed that the Attorney General's department had been informed of the police department's findings and that a senior Crown attorney had decided that no charges would be laid against Cross.

Because the Board of Enquiry is made up only of members of the Winnipeg Police Department, it amounts to a panel of officers sitting in judgment of fellow officers. When it was suggested to Chief Stephen that civilians also should participate on such a board, he testified that he saw no problem with a civilian's sitting on the board, but told us that he only thought about it a week prior to testifying before us. As to the suggestion that RCMP officers sit on the board, he testified that he had not considered appointing an RCMP officer, but then stated that he felt that it would not be a good idea as the public and others would say that even a former or retired RCMP officer is still a policeman.

The Firearms Board of Enquiry convened without having all the information. It does not appear that the convening of a Firearms Board served any purpose in this case other than to attempt to maintain a positive image of the police department and assist in corroborating an officer's version of events.

The Board of Enquiry has no independence or separate resources to conduct an investigation and its report appears to have been a public relations exercise. It would seem logical that as an inquiry it should have interviewed at least the key witnesses involved, but it did not do so. The unseemly haste with which the Firearms Board of Enquiry purported to investigate the incident led to a negative public reaction in the

form of newspaper articles and criticism from Aboriginal groups. It was readily apparent that the investigation was incomplete and that the desire to clear the police officer so quickly was inappropriate. That inappropriate conduct was compounded by the later statement of the Chief of Police clearing Cross and blaming Harper for his own death.

The Chief's Statements

Even before the Board of Enquiry, and under the direction of Chief Herb Stephen, the police department quickly communicated its version of events to the public. Stephen instructed Staff Sgt. Don Peters, the departmental media officer, to draft a news release which was issued at 9:00 on the morning of the shooting, even before Harper's family was notified of his death.

The news release read:

For immediate release –
Wednesday, March 9, 1988 at 09:00 hours
Shooting Incident

At about 2:25 this morning, a patrolling police unit observed an auto in the vicinity of 60 Keewatin Street that had been reported stolen at about 1:00 a.m.

The officers attempted to stop the vehicle which was occupied by two males who ran the vehicle into a snowbank at Winks Street and Alexander Avenue and fled on foot.

A 14 year old male youth was arrested after a short foot chase. A description of the second suspect was broadcast and about 2:30 a police officer confronted another male in the 1200 block of Logan Avenue who fit the general description of the suspect. The police officer was knocked to the ground and a struggle ensued over the policeman's revolver and the revolver discharged striking the deceased in the chest.

A 36 year old man was taken by ambulance to H.S where he was pronounced dead on arrival.

A second suspect, a male adult, has been arrested in regards to the stolen vehicle. (Exhibit 86)

The next day, after receiving the exculpatory report from the Firearms Board of Enquiry, the Chief immediately prepared a second news release himself and issued it at 3:30 p.m. In this release he concurred with the decision of the Firearms Board and concluded that Harper's death was "precipitated by the assault on the officer by Harper," and found that there was "no negligence on the part of the officer."

For immediate release by chief of police H.B. Stephen – Thursday, March 10, 1988 at 3:30 p.m.

As you are already aware a patrolling police unit observed a stolen motor vehicle in the vicinity of 60 Keewatin Street at approximately 2:25 a.m. – March 9th, 1988.

The vehicle was abandoned at Winks and Alexander by two males who fled on foot.

A 14 year old male youth was arrested after a brief foot chase and this resulted in a description of a second suspect being broadcast.

At approximately 2:40 a.m. a lone police officer who was searching the area for the second male suspect observed John Joseph Harper walking east on the north sidewalk of Logan Avenue approaching Winks Street. In the opinion of this officer Harper matched the general description of the second male.

The officer approached Harper and advised him he matched the description of a suspect wanted for theft of auto and requested identification. Harper refused and continued to walk away. The officer took hold of Harper by his right arm. At this time Harper turned to face him and pushed the officer with both hands on the shoulders.

The officer lost his balance and fell backwards onto the ground. As he fell he grabbed Harper by both arms and he fell on top of the officer.

As the officer attempted to push Harper back, Harper reached down and grabbed at the butt of the officer's service revolver.

In the ensuing struggle the revolver came free from the holster and the officer managed to hold the butt while Harper pulled on the barrel of the weapon.

The officer felt the weapon sliding out of his hand and at that time it discharged with the bullet striking Harper in the chest. Harper let go of the revolver and slumped to the ground.

Assistance was requested and Harper conveyed to the Health Sciences Centre, but was pronounced dead shortly after.

The Police Department Firearm's Board of Enquiry convened and reviewed the details of this incident. They reached the conclusion that the death was precipitated by the assault of the officer by Harper and the subsequent struggle for his service revolver which accidently discharged. They found no negligence on the part of the officer and I have concurred with their findings.

> The report on this incident has been reviewed by the senior Crown attorney, Bruce Miller. He found no evidence of a criminal offence and no charges will be laid.
>
> The chief medical examiner for the province will be arranging for a hearing into the circumstances of this incident.
>
> The officer involved is 33 years of age and has been a police officer for four years. Under a Department policy in regards to post-traumatic incidents, the officer is presently off duty. (Exhibit 87)

Neither the board's report nor the Chief's press release made any reference to an ongoing investigation, although there was obviously an extensive amount of information yet to be gathered. When the board and the Chief exonerated Cross they did not have all the evidence, such as the lab results or the reports of all the officers involved. The gun had not been fingerprinted and the canvass was incomplete. The Chief agreed with us that the investigation was continuing at the time and was far from complete.

The Chief said that he had no intention of creating the impression that he had exonerated Cross. The Chief testified that he only said he found no negligence on the part of Cross. The Chief admitted that his press release exonerating Cross of any negligence may have been premature and unwise. He stated that if a similar situation arose again he likely would wait until the investigation was complete, and possibly until after the inquest and allow the judge in the matter to make the decision.

It was obvious that the police department, and especially the Chief, was anxious to clear Cross and thereby clear the department. The Chief's conduct in issuing the press releases was entirely inappropriate since the investigation was incomplete. Even the established guidelines were not followed.

Section A. of the Media Release Guidelines in the department's Procedures and Reporting Manual specifically states: "4. Do not release information which may hamper the investigation."

Section B. of the guidelines states that prejudicial information is not to be released and that includes "speculating or expressing opinions," and "releasing information detrimental to the police investigative position."

The Chief erred in his hasty exoneration. The Chief should not come to a conclusion before an investigation is complete, and if an investigation is ongoing then the Chief should say as much and refrain from coming to a conclusion. By prejudging the innocence of Cross and the wrongdoing of Harper, Stephen effectively foreclosed the possibility of a proper, independent and complete investigation. In effect, he sent a message to his department that the case was closed. Only the most exceptional or reckless officer would have risked embarrassing the Chief by pursuing the case. We conclude that for all intents and purposes no further effective investigation by the Winnipeg Police Department was possible after the March 10 media release.

CHAPTER 7

THE INQUEST

On March 11, 1988, two days after the death of J.J. Harper, an inquest into the death was directed under subsection 9(3)(b) of the *Fatality Inquiries Act*, R.S.M. 1987, c. F52. (Although the Act was re-enacted in 1987 to comply with French language requirements, the last major changes to the Act prior to that had been enacted in 1975. The Act was amended after the inquest and we discuss the new Act (c. F52, C.C.S.M.) in the next chapter.) Provincial Court Judge John Enns held hearings on April 5–8, 11–15 and 18–20. On May 26, 1988, Judge Enns issued his written report, saying in part:

> In conclusion, despite certain shortcomings in the area of police investigation, it is my view that the shooting occurred as a result of the deceased pushing down the officer and then attempting to take his revolver. The officer's attempt to keep control of his gun is justified and the ensuing shooting I find to be accidental. I therefore exonerate Constable Cross. (Exhibit 3)

Concerns about the conduct and the conclusions of the inquest were voiced by a broad spectrum of the public. Judge Enns has a reputation as a fair-minded and even-handed jurist, and we are certain that he tried to bring a moderating influence to a difficult and potentially volatile situation. Nevertheless, Judge Enns reached conclusions with which we are unable to agree. We have had the benefit of evidence which was not available or provided to Judge Enns. In addition, we believe that he was led inevitably to the conclusions he reached by the limitations of the Act, the inadequacies of the police investigation and the manner in which the evidence was presented to him.

In understanding how we come to a different conclusion from Judge Enns, it is important to note the differences between the inquest and the Inquiry's hearings. The Inquiry's mandate was broader than that of the inquest. It specifically called for an examination of the police investigation, a determination of whether any racial prejudice was involved, and an assessment of the adequacy of investigation procedures into deaths involving police officers, as well as all matters considered by the inquest. In his inquest report, Judge Enns noted that "a very considerable portion of the inquest evidence had to do with what steps were taken to save Harper's life." Little evidence on this topic was presented at our hearings, as there was no suggestion Judge Enns was in error when he concluded all reasonable and proper steps were taken to save Harper's life after he was shot.

In addition to all the evidence of the inquest, which was entered as an exhibit before us, we heard a total of 41 witnesses during 26 days of hearings. We had the opportunity to compare the testimony of witnesses who testified at both the inquest and our hearings. We also received evidence that either was not available or did not come forward in time for the inquest. In his closing statement, Commission counsel pointed out that we had heard more than a dozen pieces of evidence that either were not considered or not considered in the same depth at the inquest. We put no restriction on the participation of those with standing. As a result, we had much more evidence, which was examined and argued in a more thorough way and for broader purposes, than was available to Judge Enns.

Limiting Cross-Examination

One of the most serious problems concerning the conduct of the inquest was the manner in which Judge Enns limited cross-examination. Section 16 of the *Fatality Inquiries Act* permitted a judge to "limit examination or cross-examination where it appears that it is ... beyond what is reasonably necessary for the purpose of the inquest."[1]

At the time of the inquest, the duties set out in the *Fatality Inquiries Act* for the inquest judge were as follows:[2]

> 20(1) After hearing the testimony adduced at an inquest the provincial judge shall
>
> (a) make a written report setting forth when, where and by what means the person deceased came to his death, the cause of his death, his name, if known, and all material circumstances attending the death;
>
> (b) if it appears to him that the death resulted, in whole or in part, from the unlawful act or culpable negligence of any person or persons, state the name or names of such person or persons, if known;

1 This power is continued in s. 28(2) of the new Act.

2 The duties are continued under the new Act in s. 33(1), although 20(1)(b) no longer applies.

(c) file with the minister the report, together with the notes or transcript of evidence taken at the inquest, but if the depositions are taken in shorthand, it shall not be necessary to file these unless specifically requested by the minister or a Crown attorney;

(d) send a copy of the report to the medical examiner who examined the body of the deceased person; and

(e) make any recommendation to the appropriate department of government or to any person where, in his opinion, the recommendation, if implemented, may prevent deaths by accident or otherwise.

Judge Enns acknowledged that deciding the extent of cross-examination was difficult. Because the Act and the case law provided little guidance, this was an aspect of the *Fatality Inquiries Act* that he ultimately recommended be reviewed.

Judge Enns openly discussed his difficulty in determining what limits to put on counsel during cross-examination at the inquest. From the outset of the hearing he was concerned about counsel's trying to question witnesses about matters already covered—a tendency he referred to as "duplicitous questioning." He clearly was influenced by the section of the *Fatality inquiries Act* giving him discretion to limit questioning.

Section 16 of the old *Fatality Inquiries Act* read:

16 Any person who, in the opinion of the provincial judge, is substantially and directly interested, may appear in person or by counsel and may examine and cross-examine witnesses; but the provincial judge may limit examination or cross-examination where it appears that it is vexatiously exercised or is beyond what is necessary for the purpose of the inquest.

Judge Enns ruled that the intent of the section was to limit questioning to determining the "when, where, and by what means" Harper came to his death, and he also decided to limit cross-examination to only those matters which had not been covered in direct examination or to matters where counsel had reason to believe cross-examination would change the answer. Judge Enns clearly wanted to ensure that cross-examination did not simply cover the same ground already covered in direct examination.

In trials, reviewing and testing statements made in direct examination are permitted invariably on cross-examination. We have some difficulty understanding the basis for Judge Enns' ruling. We would have thought that cross-examination at an inquest would serve the same purpose as at a trial. The intent of section 16 seems to be to require that all questioning of witnesses, whether in direct examination or in cross-examination, be limited to pursuing only that information which would allow an inquest judge to fulfil his or her duties under section 20(1).

Judge Enns recognized that but, in restricting cross-examination further in the manner in which he did, appears to have prevented the asking of some questions that would have assisted him to fulfil his duties better. With the greatest of respect, we disagree with his ruling.

We recognize that Judge Enns' task was made more difficult by the fact this Inquiry was established halfway through the inquest. We can see from the transcripts of the inquest that the creation of this Inquiry allowed Judge Enns to take a more limited view of what was to be covered by the inquest. Clearly, matters he could not consider would be considered by us. As one example, Judge Enns refused the request of counsel for the Harper family to have Chief Herb Stephen testify precisely because Stephen could be called to testify before us. As Crown attorney William Morton pointed out, the Harper inquest could not be considered to be a representative example of how inquests are conducted because our Inquiry was announced in the middle of it.

Judge Enns frequently stated during the inquest that he viewed his mandate narrowly. The "when," "where" and "by what means" Harper died were reasonably easy matters; the time and place were not in question, and neither was the fact that death occurred directly as a result of gunshot from Cross' gun.

The question as to how the gun came to discharge was (and still is) difficult to answer. The manner in which the cross-examination by counsel for the Harper family was limited, we believe, prevented the inquest from fairly testing the evidence of various police officers and determining the truth.

To our minds, inquests and trials are very similar. There are reasons why judges are designated by the Act to conduct inquests, not the least of which is the training and experience at formal fact-determination which judges can bring to such proceedings. Inquests are not intended to be informal meetings at which anything that anyone wishes to say can go unchallenged. Quite often, and particularly in this case, parties allowed to become involved in the proceedings have legal positions to assess and protect.

If counsel for the Harper family had been permitted fuller and freer cross-examination of police witnesses, it is possible that Judge Enns might have had a different appreciation of their credibility. We are, unfortunately, unable to state with certainty what the outcome of the inquest might have been had Judge Enns proceeded as we have indicated or if he had had the benefit of the additional evidence available to us.

Of this much, however, we are certain. Our review of the available evidence tends to suggest that the manner in which the evidence at the inquest was presented favoured the police version of events—a version we deem highly questionable and which, at our hearings, did not stand up well to close scrutiny.

We believe that the same rule with respect to the cross-examination of witnesses that applies in civil and criminal cases should be applied with respect to inquests. As long as the questions are relevant, they should be permitted.

The Conduct of Crown Attorney Morton

Several aspects of the manner in which the inquest was conducted by the Crown were called into question at our hearings.

After the shooting, the police videotaped a re-enactment of the struggle between Harper and Cross. In the tape Cross demonstrated his actions while another officer portrayed Harper. On March 27, 1988 Staff Sgt. Henry Williams prepared a

report about the videotape and submitted it to Crown attorney William Morton before the inquest. In the report, Williams said the re-enactment was used by executive officers and investigators as a visual aid to assist in the investigation. Sergeant Williams told us the re-enactment also was made for training purposes, but this was not in his report and to his knowledge the tape never had been used for that purpose. Morton told us that after viewing the tape he decided he would not inform Judge Enns or counsel for the Harper family of its existence:

> I made the decision that Sergeant Harry Williams when he testified would not make reference to it and I did not disclose this to Mr. Pollock. (p. 3178)

Morton said he believed the re-enactment was not admissible and was not fair to J.J. Harper. However, Harvey Pollock made it very clear that he wanted Cross to re-enact the struggle, and Judge Enns' initial denial of his request should have caused Morton to raise the matter at that point. His explanation that the video was unfair to Harper seems weak in the face of the failure to discuss the matter with the lawyer whose clients supposedly would have been most affected by the re-enactment. Further, once Judge Enns decided to permit Cross to re-enact the struggle at the hearing, Morton should have made the tape available to the court and let Judge Enns decide what use, if any, to make of it. Morton's decision not to disclose the existence of the videotape was an error in judgment on his part.

It seems clear that no thought was ever given to the possibility of a conflict of interest either arising or appearing to arise in this case. The conflict for the Crown was, in our opinion, quite apparent.

At 3:30 p.m., March 10, 1988—only 36 hours after the death of J.J. Harper—the Chief of Police issued a press release exonerating Robert Cross of wrongdoing. The release said the report of the incident had been reviewed by senior Crown attorney Bruce Miller, who found "no evidence of a criminal offence and no charges will be laid." As the Crown already had been consulted by the police and had reached an opinion about the incident before the investigation had been completed, it was impossible thereafter for the Crown to appear to be "independent" of the police department at the inquest.

Further, in preparing for and conducting the inquest for the Crown, Morton appeared to be assisted by senior police investigators, Acting Insp. Kenneth Dowson and Acting Insp. Rex Keatinge. After the inquest, in a letter to the Chief of Police on April 21, 1988, he stated in part:

> In conclusion may I also bring to your attention the conduct of A/Inspectors Keatinge and Dowson. Both officers who are known to the writer from previous contact, *conducted their work in order to assist the writer in presentation of all of the relevant evidence*, both in terms of witness and exhibits in order to ensure that a full inquiry was conducted. The writer appreciates that at many times he *made requests upon both officers that were probably beyond the duty of a Police Officer* in the normal execution of his responsibilities for a fatality inquiry. I would indicate that as always as its [sic] been in

> the past with dealing with these Officers, in this particular occasion it was an extreme pleasure. May I also commend both of them for their full co-operation with Sgt. Wes Border of the R.C.M.P., G.I.S. Section, "D" Division, who as you are probably aware, was instructed to provide assistance to the inquiry as a result of a request by the Attorney-General. The co-operation between Officers Keatinge, Dowson and Border, emphasized the high tradition of co-operation between the two police forces. (Exhibit 88) [Our emphasis]

Morton testified before us that Dowson was not involved in the inquest, that he did not ask Dowson to be seconded to him for the inquest and that he did not ask either Dowson or Keatinge to carry out any investigation for him for the purpose of the inquest. Generally, Morton left the impression with us that he had very little communication with either Dowson or Keatinge during the inquest. His letter to the Chief of Police is not consistent with that position.

Further evidence of Dowson's involvement in the inquest is contained in his report to Chief Stephen dated May 2, 1988, in which Dowson said in the first paragraph that he was seconded to the Special Prosecutions Branch of the Attorney General's department at the request of Morton to assist at the Harper inquest.

If independent counsel, rather than the Crown, had conducted the inquest, the public perception of conflict probably would have been reduced. What is equally important, however, is the fact that the appearance of impartiality on the part of the Crown's office was hampered by the close relationship which existed between the Crown and the police, arising from the Crown's earlier exoneration of Cross and the role of Dowson and Keatinge at the inquest.

Morton's letter to Chief Stephen of April 21, 1988 also stated:

> May I take pleasure in advising you that all of the City of Winnipeg Police Officers that testified at the inquiry did so in a thoroughly professional manner and I am satisfied provided evidence that will assist His Honour in reaching his decision into the tragic death of Mr. Harper. Although cross-examined at some length, each officer replied in a courteous, co-operative and responsive manner....
>
> In my opinion, no matter what decision His Honour comes to, Cst. Cross' conduct throughout the inquiry exemplified the highest traditions of the City of Winnipeg Police Department. (Exhibit 88)

Morton sent a copy of his letter to counsel for Cross and the City of Winnipeg Police Association, but not to counsel for the Harper family.

Morton also wrote a memo to his file dated June 10, 1988, concerning a meeting he had with the Chief and three deputy chiefs to review the criticisms made by Judge Enns in his inquest report. In his memo Morton expressed his approval of police procedures:

> The writer indicated he could find no fault with the identification officers who did attend as they appeared to do their job thoroughly....

> I am satisfied that ... the usual excellent procedures were used to speak to all persons in the neighbourhood who may have been in a position to see or hear anything....
>
> The area of alleged eye witnesses to conduct by Police Officers other than Cst. Cross was also discussed. Judge Enns' finding that these persons who claimed that Police Officers used derogatory remarks to two native youths and were running around with revolvers was simply correct. There was no evidence to establish otherwise. We all felt that it was unfortunate that these witnesses had made the comments they had as it seemed to support the view of the animosity between the native population and the City of Winnipeg Police Department. (Exhibit 89)

This was the first inquest Morton had conducted that focussed on the conduct of the police department and a specific officer. Morton told us, "I felt it was specifically very important that I remain independent," and he felt that he was able to be independent in this case. In light of the circumstances outlined above, we are of the view that it was impossible for the Crown to appear to be "independent" of the police.

Morton recognized and confirmed that Crown attorneys are supposed to remain independent from police authority. We understand that this independence may not be apparent to some who would perceive that prosecutors actually represent the police. That perception might be mistaken, but it would not be far from the truth. Although the police do not work for the Attorney General and Crown attorneys do, a relationship of interdependence inevitably arises.

In ordinary criminal prosecutions, there may be less reason for concern about the relationship between the Crown's office and the police. However, in the Harper case we are convinced that there was a legitimate cause for concern. It is our opinion that any Crown attorney faced with the task of conducting an inquest at which the conduct of a Winnipeg Police Department member is called into question is at the very least in a position of a perceived conflict of interest, if not a real one, particularly after a senior Crown has "cleared" the officer of wrongdoing.

Crown attorneys are called upon constantly to work closely with police forces in this province. When they must, as part of our adversarial system, actively pursue the truth through vigorous cross-examination of persons with whom they work closely on a day to day basis, with whom they may be close friends or associates, and on whom the office of the Crown depends for assistance in conducting prosecutions, Crown attorneys face a difficult task. That task, it must be recognized, is not of their own making, but it can be made more difficult if there is not both the existence and appearance of impartiality in the manner in which the Crown puts in the case.

We recognize that many view the Crown attorney as being an advocate for truth. Viewed in that way, Crown attorneys supposedly are above the push and shove of the adversarial fight; they are to be fair-minded and even-handed without concern for one side or the other in the fight, concerned only to see that justice is done and is seen to be done.

Those are admirable thoughts indeed, and speak of a long and solid tradition in the courts and law of this country. The difficulty is that in this case they did not match reality. The role of Crown attorney should be seen for what it has become, a job where the adversarial skills to prosecute crime are finely tuned and taught. In order to do his or her job effectively, the Crown attorney needs to have a good professional working relationship with police authorities throughout the province. Without that relationship, both police and Crown are hampered severely in their endeavours.

For that reason, when a Crown attorney is asked to look critically at the conduct of a police department or force (or one of its members) in the context of an inquest, it is difficult for him or her to do so. The task is made all the more difficult when the police department feels, and publicly states, that the criticism levelled at it is unjustified and, therefore, the searching and the probing are unwarranted.

In the final analysis, we believe it was a serious error for the Crown's office to have conducted this particular inquest. We further believe that, in future, similar inquests of police-involved shootings, Crown attorneys should not be involved. Outside counsel should be engaged from the outset by the Attorney General and matters left in the hands of that individual. In the event that an opinion as to criminal charges is requested or such charges are to be proceeded with, we also believe that outside counsel should be engaged and all such matters referred to that person for prosecution. In saying this we have come to the same conclusion as former Chief Justice Dewar who, when reporting on the "Ticketgate" investigation, urged that independent outside counsel be engaged when the Crown is too close to a case.

We will have more to say in a general way about the Crown and the need for independence when we review the new *Fatality Inquiries Act* in the next chapter.

The Findings

To many, the conclusions reached at the inquest were controversial. Chief among Judge Enns' findings in his Fatality Inquiry Report were:

- Having seen both Pruden and a picture of Harper, and recalling that Cross had not seen Pruden's face while chasing him, on the issue of whether or not it was reasonable for Cross to think that Harper may have been that second suspect, I find that it was reasonable. (Exhibit 3, p. 15)
- Once the shooting had occurred, by and large proper investigation followed. (p. 21)
- In conclusion, despite certain shortcomings in the area of police investigation, it is my view that the shooting occurred as a result of the deceased pushing down the officer and then attempting to take his revolver.... I therefore exonerate Constable Cross. (p. 22)

In his report Judge Enns considered whether police officers had directed racist comments at Allan and at Melvin Pruden, and also considered evidence indicating that police officers had their guns drawn.

The following factors have lead [sic] me to the conclusion that both the allegations of racial slurs and the allegations of drawn revolvers are not credible:

(a) Both Pruden and [Allan] were arrested for the offence of theft.

(b) Considerable problems arose about ensuring Pruden's presence at the Inquest.

(c) The manner in which Pruden demonstrated the use of the firearm is more reminiscent of a T.V. police show than reality.

(d) There was no evidence of injury to Pruden's face even though he alleged that police banged it down on the hood of the cruiser car several times.

(e) In the absence of any suggestion of an armed suspect, armed robbery or the like, and especially after [Allan], whom Constable Hodgins took to be even younger than 14 or 15 years, it seems very unlikely that police would be chasing young, unarmed boys with drawn revolvers, in direct contravention of the stated guidelines for use of their revolvers.

(f) The witness, Jaworak, [sic] stated that while their female passenger Linda Morrisette [sic] was sober, that he himself and the driver David Randall [sic] had each consumed about 8 bottles of beer during the evening before and could only testify very generally about the times involved.

(g) The manner in which Randall, Jaworak and Morrisette describe the police to be holding the revolver is equally consistent with that of a hand-held walkie-talkie radio.

(h) It was not until later that they heard of the shooting, and it may be that that information effected [sic] their recollection of what they thought they saw.

(i) Despite this knowledge, they did not report these events to either the Winnipeg Police, or the R.C.M.P. in Pine Falls.

(j) All of what these later witnesses saw, was from a car moving at about 60 k/hr. at night and happened, so to speak, unexpectedly.

All of these factors have lead [sic] me to conclude that those allegations are simply not credible. (Exhibit 3, p. 13–15)

Counsel for the Harper family summarized the inquest evidence and conclusions this way:

Five native or part-native civilian witnesses testified at the inquest into the shooting death of native leader J.J. Harper. All testified to seeing drawn police revolvers; two testified to being victimized by racial slurs spoken by

> police. Not one native witness was believed by the presiding judge; instead, favour was found in the testimony of police personnel. It is noteworthy that the inquest judge disallowed counsel argument, argument which now touches upon the frailties and inconsistencies of police testimony which bolsters the correctness of native accounts. Unfortunately, a critical analysis of the evidence continues to manifest warranting examination of Judge Enns' reasoning finding native incredibility documented in Exhibit 3, pages 13–15, the Inquest Report. (Written submission, p. 6)

We believe that it is unfortunate that Judge Enns did not find the evidence of Aboriginal witnesses to be credible. We make different findings on credibility. For example, we accept as credible the testimony of Allan, Linda Morissette and Melvin Pruden, and we question the credibility of some of the police officers.

Based on the new evidence we heard, our reassessment of existing evidence, and our findings on credibility, we are led to different conclusions from Judge Enns.

We do not accept that Cross had sufficient reason to regard Harper as a suspect. Nor do we accept that the police investigation was proper. We believe that at least two police officers had their guns drawn on the night of the shooting. Harper did not push Cross down, Cross pulled Harper. Finally, we do not believe there was sufficient evidence to exonerate Constable Cross.

CHAPTER 8

THE FATALITY INQUIRIES ACT

Part of our mandate is to report on "the adequacies of procedures for inquiry into the death of persons whose deaths occurred while in contact with the police."

It is important to note that since the Harper inquest, a new *Fatality Inquiries Act* has been enacted. (c. F52, C.C.S.M.) It was proclaimed into effect on May 14, 1990. The new Act had been planned for some time before the Harper inquest, as its predecessor had not been changed since 1975. In our opinion the new Act still does not address matters brought to light during the Harper inquest.

The *Fatality Inquiries Act* deals with situations where there are unexpected deaths. The Act is concerned primarily with establishing a system for the investigation of such deaths. The vast majority of such deaths do not require inquests. The Act creates the office of the Chief Medical Examiner and sets out rules for the medical examiner to ensure unexpected deaths are reported and investigated if necessary, to have autopsies performed if necessary and, finally, to hold inquests if necessary. Thus, inquests are only a small part of the concern of the Act.

Inquests are held at the direction of the Chief Medical Examiner. Pursuant to section 19(3) of the Act, the Chief Medical Examiner shall direct a provincial judge to hold an inquest where there are reasonable grounds to believe:

(a) that a person while a resident in a correctional institution, jail or prison or while an involuntary resident in an institution as defined in The

> Mental Health Act, died as a result of a violent act, undue means or negligence or in an unexpected or unexplained manner or suddenly of unknown cause; or
>
> (b) that a person died as a result of an act or omission of a peace officer in the course of duty; ...

In other situations the calling of an inquest is at the discretion of the Chief Medical Examiner. Often, one is called where the circumstances of a death are not clear or where the public would benefit from knowing what caused the death. Some inquests produce recommendations that lead to changes in the law or to some safety-related private or governmental regulations or procedures. In some cases inquests are not called at all.

Limits on Questioning

The interests of the family and of the public appear to be limited in the Act by the section allowing the judge to limit examination or cross-examination where it is vexatious or is beyond "what is necessary for the purpose of the inquest." In any court proceeding, the judge is always at liberty to limit questioning to matters that are relevant. There is no need, in our opinion, for this section in the Act, and its existence may serve as an invitation to the judge to limit questioning unduly. Instead, there should be a presumption in favour of thorough questioning. The family of the deceased undoubtedly would have important interests that must be considered. The inquest is the last and most thorough phase of investigation into most unexpected deaths, unless criminal or civil proceedings result. Families should not have to rely upon those alternatives.

Reporting to the Family

Another serious failing of the Act is that there is no statement that the purpose of the reporting and investigating of such deaths is to serve the public interest or the interest of the family of the deceased.

Instead, the Act gives every appearance of indicating that the purpose of reports and investigations is to serve the interest of government. In most cases, but not all, the government interest, the community interest and the family interest are the same and no problem arises. But occasionally they are not, and in such instances no guidance is provided to deal with the conflict.

It is clear there is a strong community and family interest in having unexplained deaths investigated and the results of the investigation made known. However, the Act only requires reporting to the minister and the medical examiner. There is no presumption in favour of public release of the findings, or a requirement that the report go to the family. If a report is disclosed to a person by the Chief Medical Examiner, that person is not allowed to disclose the report to others without written permission from the Chief Medical Examiner.

The Act should be amended so families are fully informed about proceedings. The definitions of "family" should be broadened. The Act now defines "member of the family" to be a member of the nuclear family. This is not appropriate for Aboriginal communities where the extended family is very important. On Indian reserves, the chief and council are important parties to advise of the proceedings.

Reporting to the Public

The new Act makes public release of the proceedings even more difficult than before. There are now several provisions allowing an inquest judge to make the hearings of the inquest confidential. One of the reasons to order the public excluded from the hearings is if the matter "involve[s] public security."

Because "public security" is not defined by the Act, its meaning is open to interpretation. It is essential that its definition not include police-related deaths like the death of J.J. Harper. These are cases for which public hearings and findings are of the utmost importance to maintain public confidence in our police, and to ensure that any problems with policing are made known and corrected. In fact, cases involving public security, especially policing, should be open to the public. We cannot imagine a situation involving public security that should be conducted in private. Protection of police informants' names or information that jeopardizes an ongoing investigation can be accomplished by putting a ban on publication or, if the necessity is proved to the judge, by allowing very limited exclusion of specific information. If a matter affects national security, the *Official Secrets Act* extends any necessary protection.

The Act also speaks about the need to ensure that the privacy of a person is not breached unreasonably or that the "professional reputation" (undefined) of a person is not damaged unjustifiably. The Act sets out the factors for an inquest judge to consider. While the judge should consider whether confidentiality is in the interest of "justice" or would be "injurious to the public interest generally," the Act does not require the judge to consider the interest of the family or the community. The judge also should consider whether a ban on publication of the affected individual's name will achieve the desired result without having to make the hearings and the report fully confidential.

Section 10 of the Act provides that when a child dies after having been in the custody of a child care agency or when the deceased child's parent, guardian or sibling was receiving services under the *Child and Family Services Act*, the Chief Medical Examiner must assess (by way of investigation or inquest) the quality of the standard of care or service and submit a report to the minister. The report must be confidential. Such matters might be of vital public interest. Inquests are not mandatory in such situations. If the Chief Medical Examiner decides an inquest is not necessary, the only information will be in the Chief Medical Examiner's report. This report should be made public, with the names of affected persons deleted if necessary.

Section 20 of the Act provides that where in the opinion of the Chief Medical Examiner a death might have been prevented if precautions had been taken or preventive measures been in place, the Chief Medical Examiner may make recommendations

to the agency or to other persons as to possible precautions or preventive measures. Again, there should be a requirement that such recommendations be made public.

Culpability and Exoneration

An important deletion from the former Act is the question of culpability. While the old Act required the judge to comment about culpability, the new Act specifically forbids opinions "with respect to culpability in such manner that a person is or could be identified as a culpable party." It is appropriate that opinions regarding culpability not be expressed as the result of an inquest. An inquest is an information-finding exercise, not an attempt to determine guilt. There are very serious consequences attached to findings of either civil or criminal culpability and there are many rules to protect individuals against whom such allegations are made. Those protections are not present during an inquest.

We support the change to the Act that prevents a judge at an inquest from saying that a person may have committed some criminal act or may be negligent or liable to some civil action. Nevertheless, we suggest the Act should go the next step and say that a judge should not express an opinion that a person has not committed a criminal act or has not been negligent in causing a death. Exonerations can be unfair to the family of the deceased and can damage unfairly the reputation of the deceased, the deceased's family and, sometimes, the deceased's community. The rights of those who may wish to take criminal or civil proceedings might be prejudiced by such a finding, in the same way a person might be prejudiced by a suggestion of liability. In our opinion that determination should be left to a civil court if someone wishes a ruling on the point.

We recommend that section 33(2)(b) be amended to prohibit the judge from making any comment on the existence or absence of any possible civil or criminal liability.

WE RECOMMEND THAT:

- The *Fatality Inquiries Act* be amended to contain a statement of purposes, foremost of which is to ensure public proceedings at which the family and community learn the material circumstances of the unexplained death. For deaths related to government agencies, the primary purpose should be to ensure the public learns whether the government agency functioned properly.
- The *Fatality Inquiries Act* be amended to delete the limitation on questioning witnesses to provide for normal examination and cross-examination of witnesses by all parties with standing.
- The *Fatality Inquiries Act* be amended to provide that all hearings shall be public, but allow the judge to order a ban on publication of names in appropriate cases.

- The *Fatality Inquiries Act* be amended to make inquest reports and records of each inquiry or investigation available to the public or at least to interested parties.
- The *Fatality Inquiries Act* be amended so that in the case of Aboriginal deaths, interested parties should be considered to include band or community councils as well as extended family members.
- The *Fatality Inquiries Act* be amended to ensure that findings of culpability and exoneration are treated the same way in the Act.

The Role of the Crown

The Act is strangely silent on who has carriage of the inquest. In civil cases the lawyers call the witnesses and the plaintiff usually goes first. In criminal cases the Crown attorney has carriage of the case and calls witnesses to establish the charge. The defence has the option whether to call witnesses.

Inquests, however, are conducted by Crown attorneys as a matter of convention. However, the *Fatality Inquiries Act* does not direct Crown attorneys to be involved, nor does it explain fully the role of the Crown attorney. The Act says, "Any Crown attorney or other officer or any counsel appointed by the minister to act for the Crown may attend the inquest and may examine witnesses called at the inquest."

The Act does not say there should be a Crown attorney present. Nor does it say the Crown attorney should decide what witnesses to call to ensure that all relevant evidence is presented. Indeed, based on the way the Act reads, it would be possible for the judge to decide what witnesses to call and to conduct the initial examinations of all witnesses. However, our tradition is an adversarial one, with parties with conflicting interests conducting the examinations while the judge remains neutral and does not ask many questions. As a result, Crown attorneys have been assumed to have conduct of inquests, and the Harper inquest was no exception.

We recommend that the Act make it clear that, except in situations where a conflict of interest exists or may be perceived, a Crown attorney shall call and examine whatever witnesses are considered appropriate. The Act also should make it clear that other parties with standing, or their lawyers, have the right to cross-examine witnesses called by the Crown. Those parties should then have the right to call and to examine witnesses they wish to have testify. All counsel should have the right to make submissions after all the evidence has been presented.

Ensuring Independence

The Act does not anticipate the possibility of a conflict arising between the party conducting the inquest and the one who is the subject of the inquest. No rules about how to challenge the conduct of Crown attorneys are set out. No rules of

disclosure exist requiring the Crown attorney to disclose to other parties all the evidence available to the Crown attorney.

As we have seen with the Harper case, there is a real possibility of conflict in a Crown attorney's conducting an inquest. Conflicts also can arise in other situations in which a public agency is involved in a death in some way.

For example, inquests are mandatory where a person dies in a jail or as an involuntary inmate in a mental health institution. Investigations (one step before ordering an inquest) are mandatory when a child dies who was in the custody of a child welfare agency or where the deceased child, or the parent or guardian or sibling, was receiving services from a child welfare agency.

In those situations, the Department of Justice, in particular, may be involved in some other way. The department is responsible for the administration of justice, for monitoring police actions and policing legislation, for making decisions about criminal charges, for jails, for the Public Trustee, and for advising other government departments. The possibility of having one Crown attorney conducting the inquest and another Crown attorney acting on behalf of a government agency or department is very real in many cases.

The government definitely should be in a position to argue its account of the events and defend its actions, but in such a situation a completely independent person should conduct the inquest, and have access to all relevant files. The government cannot defend its actions and present a "version," while at the same time purporting to assess independently and present all the available information. The two activities constitute a conflict. At the very least, there is a perception of a conflict.

Families of deceased persons should not be put in the position of having to challenge and rebut the "official version" when the death involves a public agency. Crown attorneys should not be able to decide unilaterally what is and is not relevant information for an inquest. The approach of the person calling the evidence at the inquest must be that there is no "version." Therefore, whenever a government agency or department's actions are to be scrutinized at an inquest, counsel conducting the inquest should be independent of government.

Neither should a Crown attorney call evidence at an inquest where another Crown attorney either has already assessed the case for purposes of considering criminal charges or is preparing to defend a civil suit for the government agency.

Another element of unfairness in the way inquests presently are conducted occurs in cases in which the actions of a government department or agency are being examined. The department or agency has virtually unlimited funds to defend its own actions. By contrast, the family of the deceased may have only limited funds, or may have to make unreasonable sacrifices simply to ensure its questions and concerns are addressed. This disparity puts the government agency in a far better position to defend its actions than that of the deceased's family to pursue its questions and concerns effectively.

WE RECOMMEND THAT:

- The *Fatality Inquiries Act* be amended to set out who has conduct of an inquest and to provide that where an inquest involves a government agency or a police officer, a non-government lawyer be retained to conduct the inquest.

Appeal Provisions

The *Fatality Inquiries Act* provides that it is up to the Chief Medical Examiner in many cases to decide whether an inquest is to be held. In other circumstances an inquest is mandatory. While the Minister of Justice has the overriding authority to order an inquest, that decision, as well, rests with one individual. Members of the public who would like to see an inquest held have no way of making formal representations that one be held.

If the public or the family is dissatisfied with a decision not to call an inquest or with the way in which an inquest has been held, or is dissatisfied with the result, there is only limited opportunity to complain and to seek the holding of another inquest. The only avenue a dissatisfied member of the public can follow is to go to the Court of Queen's Bench on an application for judicial review of the conduct of the inquest.

The "judicial review" procedure is limited; the Queen's Bench judge cannot substitute his or her opinion for that of the inquest judge. The usual issue to be considered by the Queen's Bench judge is the propriety of the procedure followed during the inquest. The conduct of the judge also may be examined to see if the inquest was carried out within the jurisdiction of the Act and in an appropriate manner.

The refusal of the Chief Medical Examiner or the minister to order an inquest cannot now be taken to the Court of Queen's Bench for review. These are administrative decisions and are not subject to review by the courts.

WE RECOMMEND THAT:

- The *Fatality Inquiries Act* be amended to specify the right of any person with an interest to apply to the Court of Queen's Bench for an Order that an inquest, or a second inquest, be held:
  - Where, with respect to a death, one has not been ordered by either the Chief Medical Examiner or by the Minister of Justice; or
  - Where the person alleges that the first inquest did not explore adequately the circumstances surrounding the death or alleges that the conclusion was not supported by the evidence.

> The test to be applied by the judge in these circumstances should be "the public interest." The result should then be that a judge would have the authority to order that an inquest be held, or that a second inquest be held, if the judge is persuaded that it is in the public interest to do so.

Conclusions

The events of the Harper inquest show the *Fatality Inquiries Act* is in need of significant amendment to protect the interests of the family of the deceased, and the community. As the Act is now worded, every advantage belongs to the government agency, or, in this case, the police, in the defence of its actions. The purpose of the Act should not be to assist agencies to defend their actions, and most particularly not to help shield them from close scrutiny.

The weaknesses of the inquest procedures now in place in Manitoba are, in part, what made this Inquiry into the Harper death necessary. The Harper inquest was unable to fulfil its purpose of explaining all the circumstances surrounding the death in a way that commanded the respect and acceptance of the public.

The recent amendments have done nothing to address the problems that arose from the Harper inquest. In fact, the recent amendments may have made matters worse by inviting more applications for confidential proceedings, and by creating greater difficulties for inquest judges by allowing findings of exoneration and culpability to be subject to different rules.

Present procedures are not seen to be and, in fact, are not adequate. Changes must be made. If not, there is every reason to believe this kind of ordeal—a complete lack of confidence in inquest procedures by members of the deceased's family and the affected community, and a resulting sense of injustice and alienation, with subsequent demands for a public inquiry to clear up the problem—will happen again.

CHAPTER 9

INVESTIGATING POLICE MISCONDUCT

The Investigation of the Harper Shooting

Our examination of the Winnipeg Police Department's investigation into the shooting of J.J. Harper has led us to two conclusions. First, police departments are inherently in a conflict of interest—both perceived and real—when called upon to investigate the shooting of a citizen by one of their members. The perceived conflict of interest arises because a member of the public reasonably might conclude that institutional interest might be placed ahead of the public interest in the course of the investigation.

This is so even if a decision is made to prosecute an officer. It could be concluded that a decision to prosecute arises from the department's wish to maintain a certain image. The same allegation could be made if the decision is made not to prosecute. The department cannot win. Even if a prosecution results in a conviction, the department could be accused of having pursued the prosecution because it had no choice. On the other hand, if the investigation is conducted by someone free from those influences, then no conflict, real or perceived, exists.

Our second conclusion is that the Winnipeg Police Department was guided more by self-interest in the Harper investigation than by public interest. There were many errors and poor decisions. Supervision was not competent and evidence was mishandled. Harper's death was not investigated in a thorough and independent fashion. This resulted in the failure of the subsequent inquest to examine and explain all the circumstances surrounding the death in a manner that the public could accept and respect.

Chief Herb Stephen testified that the City of Winnipeg Police Department did not consider bringing in an investigating team from outside the department to do the investigation. When questioned by Commission counsel at our hearings, he remained adamant in his opposition to the idea of an outside investigation:

> Q Are there any circumstances in which you would consider it appropriate to have an external police force investigate alleged conduct of a member of your department?
>
> A Mr. Schulman, I do not think that is necessary. I think that we can stand on our own record for the way we have handled investigations involving our own people over the years, serious crimes, minor crimes, crimes of every nature and we have investigated those by our own people and brought those to successful conclusions and convicted people in court.
>
> Q But are there not circumstances in which it is apparent to you that there are members of the public who have a concern about the thoroughness of your department's investigations?
>
> A All I can say is I stand on our record. They may think that, but certainly if they look back, they will see that we have done things successfully ourselves....
>
> I think we have done an adequate job, a great job in investigating our own people. It's something we don't want to do, but when it comes to our attention, we do it and we do it properly. (p. 3099–3100)

Despite the Chief's confidence, the City of Winnipeg Police force has demonstrated to us that it was incapable of conducting a thorough and professional investigation in this case. Obviously, it was asking too much of this force to investigate a death involving one of its own officers. It also was asking too much of the public to believe that such an investigation would or could be independent or unbiased. An improved process needs to be put in place to ensure that deaths involving officers are investigated and handled in a thorough, independent manner which guarantees due process for officers and accountability to the public so that proper respect for the police function is not jeopardized.

Citizens in a democratic society have every right to expect that fatalities involving a police officer are investigated properly and thoroughly. They also are entitled to be able to lodge complaints concerning the actions of officers acting in an official capacity with an independent, effective, fair and open public-complaints body.

We have found that there is a growing demand in Canada and elsewhere for independent reviews of citizen fatalities involving police officers. We have found that in other jurisdictions various mechanisms have been put in place in response to this same concern, most recently in Ontario.

When questioned as to his knowledge of the work of other police departments, Chief Stephen was aware of only a few shooting cases where outside police investigators were called in. He was quick to point out that over the years there have been many situations in which police departments successfully conducted investigations of their own

officers. While a police department may argue it is capable of conducting investigations of its own officers in a professional, independent manner, it simply is not capable of dispelling the perception of a conflict of interest. In such situations, the department must understand that the perception of conflict of interest should be enough to cause it to seek an external investigation.

We cannot see any reason for a police department to object to external investigations. Ideally, it should not matter who does the investigation—they should be able to find the same things. Nor do we think there is any reason to object when the result will be to enhance the department's reputation for openness to review and sensitivity to public perceptions. In our view, when situations of a perceived conflict of interest arise, it is in the department's best interests, and in the community's best interests, for there to be an external investigation.

Special Investigation Procedures

During the course of our Inquiry, we became aware of a number of serious incidents involving police and Aboriginal people. These include the death of J.J. Harper, but also include the death of Floyd Head from Moose Lake, killed some years ago in an incident involving the RCMP; Jason Daniels, seriously injured in a shooting incident with the Brandon City Police; and Patrick Dan De La Ronde, seriously injured in a recent shooting incident with the City of Winnipeg Police.

In addition, there have been notorious incidents in other jurisdictions. In Toronto and Montreal there have been incidents of police shootings of black persons. In Vancouver there was an incident of police brutality that resulted in a consideration of it by the Supreme Court of Canada[1] and recent cases of police brutality in the United States have caused that country to review all such allegations over the past several years.

It is vitally important for the good of our communities that the public has confidence in its police forces, and that good police officers not be tainted unfairly by misdeeds of other officers. For this reason, many jurisdictions are investigating ways to enhance the reputation of the police and restore public confidence by developing strong, effective, independent mechanisms by which to investigate complaints against the police.

In our general report, we discuss public complaint processes against the police. These complaints can include discriminating on the basis of race, failing to exercise restraint with a firearm, altering an official document, using excessive force, using abusive language, being discourteous or uncivil, or a range of other acts known as "disciplinary defaults" (these are set out in s. 29 of the *Law Enforcement Review Act*, cap. L75, C.C.S.M.). Here, we limit ourselves to a discussion of the independent investigation of serious incidents involving the police, particularly where potential criminal acts are alleged, or death or serious injury have resulted.

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1 *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591.

We believe recent developments in Ontario have much to recommend themselves for consideration in Manitoba. On December 31, 1990 Ontario proclaimed into effect its new *Police Services Act.* This Act is wide-ranging in its recommendations on policing principles, organization, monitoring, public complaints and special investigations. Throughout the Act, the importance of public input is stressed.

An important feature of the Act is the creation of a Special Investigative Unit to be called in when a serious incident involving the police arises. This unit reports directly to the Attorney General of Ontario. Police forces are required to give their full cooperation and assistance to this unit. The unit may commence investigations at the initiative of the director of the unit or the Attorney General. The unit may lay charges against police officers. The unit may not use an investigator who is or has been a member of the police force under investigation.

WE RECOMMEND THAT:

- The Minister of Justice establish a plan of action to deal with any incident where possible criminal acts are alleged against the police, or where a person dies or suffers serious injury in an incident involving a police officer.
- This plan of action include either the creation of a standing special investigations unit or a plan to assemble quickly a special investigations team for a particular incident, able to take control of the investigation immediately following report of the incident. The unit or team should not include officers from the police department under investigation. The plan should include independent counsel to give advice concerning the laying of criminal charges. This counsel should not be a Crown attorney. The unit or team should report directly to the Minister of Justice.
- The police forces in the province be required to provide all available assistance and cooperation to the special investigations team.

CHAPTER 10

RACISM

We have heard evidence that supports allegations that racism played a part in the shooting of J.J. Harper and the events that followed.

Constable Cross was motivated to confront Harper primarily because of Harper's race. That should never have been the case. We heard evidence from Melvin Pruden and Allan that officers directed racist comments at them. We heard evidence from a journalist who interviewed Const. Robert Cross that racist comments were made at the shooting scene and that subsequently a racist joke related to this shooting made the rounds at the Public Safety Building. The evidence is clear that racism exists within the Winnipeg Police Department.

Including "Race" in Police Descriptions of Suspects

The City of Winnipeg Police Department Procedures and Reporting Manual addresses the use of race in describing suspects and states in Section XI, Media Liaison:

> **D. Suspect Description Release**
>
> Caution must be exercised when releasing descriptions of suspects to the media, so as not to malign specific ethnic or racial groups. This is most important when a suspect has been described by a witness as a member of a specific visible minority.
>
> Nothing in this policy is intended to prevent the use of specific facts which may assist in an investigation where the suspect has been positively identified as a

> member of a specific group, and the information is intended to appeal to a specific ethnic community for assistance.
>
> However, as a general rule, where a description is obtained from a witness indicating a specific visible racial or ethnic group, based on opinion of the witness, that description should be made in broad generic terms.

The manual then gives various examples, one of which refers to Aboriginal people, and states: "Persons of North American Indian extraction including Metis should be described as: 'Native in appearance.'"

The guideline clearly is inadequate.

The problem with using race, such as "native," in identifying a suspect is that the attention of the police officers is directed to Aboriginal people generally.

There is strong evidence to suggest that merely describing someone by reference to race appeals to stereotypes held about that group. Asking police to search for a "native" calls upon officers to reach conclusions about how the person they are searching for looks, or talks or behaves. There is no commonality among Aboriginal people in their appearance, manner of speaking or behaviour.

Mentioning a suspect's race does little to assist the officers on the street, in our opinion. If they are to look for people with a certain skin colouring, then we believe that the description of the suspect's complexion should suffice. Aboriginal people come in all shapes and sizes, and have skin colouring that can range from dark to fair. It seems illogical, therefore, to assume that by stating that a person is "native," one can conclude how that person looks. If a police officer is directed to look for a "native" male, the question arises: What type of person is he or she looking for? The facial characteristics of Aboriginal people are not sufficiently distinctive from those of other racial groups to justify the use of the category in police broadcasts. The retention of such a practice will continue to lead to situations, we believe, where Aboriginal people are confronted by police officers solely or primarily because of their race.

To advise police officers that a suspect in an offence is a native is a licence to commit racism. That should not be condoned.

If officers were given proper descriptive details about such things as colouring, age, weight and hair length, they would avoid the kind of stereotyping that was at the root of the problem in this case. Cross, for one reason or another, ignored other particulars of the description of the suspect, seizing on the word "native." He stopped the first Aboriginal person he saw, even though that person was a poor match for the description in other respects and a suspect already had been caught.

Racial stereotyping motivated the conduct of Cross. He stopped a "native" person walking peaceably along a sidewalk merely because the suspect he was seeking was native. This then leads to the conclusion that race was a major contributing factor in the death of J.J. Harper. Race was one of the facts included in the description broadcast of the car-theft suspect for whom the police were looking. If Harper had not been a native person, Cross would have ignored him.

It is our conclusion that including the race of a suspect in a police broadcast of suspects involved in the commission of an offence is inherently dangerous. Broadcasting such information really does not assist greatly in police efforts and may result in the invasion of the rights of minority group members, as was the case for J.J. Harper.

WE RECOMMEND THAT:

- The Winnipeg Police Department cease the practice of using race as a description in police broadcasts.

Racism and the Winnipeg Police Department

Apart from Cross' approach to Harper, there were other actions that night which cause us concern. Among these is the conduct of Hodgins in the handling of the Aboriginal youth, Allan. According to the statement she gave to police, Hodgins said to the youth, "You little thief if you hadn't stolen the car none of this would have happened." The youth said she also called him a "blue-eyed fucking Indian." Hodgins told us she did not remember making the remarks attributed to her in the statement and denied making the racial slur.

We accept Allan's evidence on this point. We found Hodgins to be forgetful and in some instances clearly wrong in her evidence. Her comment to Allan was racist.

Melvin Pruden alleged that when he was being arrested, a police officer, whom he identified as Constable Isaac, slammed him against a police car and called him "a fucking Indian." Isaac denied this. On this point, we prefer the evidence of Isaac, although this does not mean that we disbelieve Pruden on other points.

Other suggestions of police racism related to the Harper case arose out of an article published in the December 1988 issue of *Saturday Night* magazine. The story was written by Don Gillmor, a contributing editor of the magazine and a boyhood acquaintance of Robert Cross'. Gillmor did not attend the inquest but followed the proceedings and reviewed the transcript. He drew on his own experiences as a former resident of Winnipeg, his personal knowledge of Cross, as well as other research he did for the article.

Gillmor interviewed Cross the day after Judge Enns delivered his inquest report in May 1988. He had two other conversations with Cross. In the article Gillmor quoted an unidentified officer whom he identified to us as Robert Cross:

> "Harper was the author of his own demise," said an officer on the Winnipeg force. "The natives drink and they get in trouble. Blaming the police for their troubles is like an alcoholic blaming the liquor store for being open late." (Exhibit 33, p. 50)

Gillmor said that Cross told him of comments made by other officers at the scene and subsequently:

> "That's right," one officer said, "bleed him dry," and another officer said: "If you're lucky, that fucker dies." (p. 45)

Gillmor related other racist observations he had heard about during research for his article:

> "If Harper had lived," one officer said, "he would have had a different version, no matter what really happened."
>
> A friend of Rob's felt it was largely a question of shooting the wrong Indian. If it hadn't been someone politically prominent, it wouldn't have become an issue. "Maybe they should give him a medal for shooting an Indian. I don't really mean that, but you know, I mean when you find out what the police actually have to put up with every day. And everybody basically hates their guts...." (p. 52)

Cross denied most of the comments related in the article, both in his testimony before us and earlier to a *Saturday Night* fact-checker. All officers who were asked testified that they did not make or hear any of the racist remarks quoted in Gillmor's article, except for the joke.

Nevertheless, because of his forthright testimony, which was not shaken under cross-examination, we are prepared to accept the evidence of Don Gillmor. We conclude that racism exists within the Winnipeg Police Department and that it was expressed openly the night that Harper was killed.

In his article Gillmor also recounted a joke which was being told around the Public Safety Building after the shooting:

> 'How do you wink at an Indian?' is a joke that made the rounds of the Public Safety Building in Winnipeg after Harper's death. The answer was a pantomimed pull of a trigger. (p. 52)

Cross admitted to us that he had heard this joke but could not recall who told it to him.

Chief Stephen testified that he knew nothing about Gillmor's article until counsel for the City gave him a copy. Stephen said he had never heard the joke and stated that,

> I hear jokes and I don't class them as racial jokes, the ones I've heard. They're ethnic jokes, not racial jokes. (p. 3046)

The Chief said he had not recently heard an officer refer to Aboriginal people in a derogatory way but testified that, "I suppose at some time in my career I must have heard it." He testified that he "Just disregarded it."

Chief Stephen's readiness to disregard racism is disturbing. He did not display much concern about the remarks reported in Gillmor's article and apparently made little

effort to investigate them. Similarly, there is little indication that he has taken action to assess the general level of racism within his department or actively attempted to discourage it. During cross-examination he was asked about racism within the department:

> I don't condone racism myself and I don't condone it within my people. If something is brought to my attention, I would do something about it....
>
> Q [H]ave you disciplined officers or cautioned officers in that regard?
>
> A No, sir.... (p. 3226)

A chief of police and his senior staff must set an example to their department. They must actively let their officers know that racism will not be tolerated and that positive racial attitudes are expected from everyone on the force. There is no evidence that Chief Stephen has set such an example for the Winnipeg Police Department.

In the next chapter we will discuss ways in which racism might be better detected and combatted within the Winnipeg Police Department.

CHAPTER 11

THE POLICE AND ABORIGINAL PEOPLE

The Winnipeg Police Department has placed only limited emphasis on increasing the cultural sensitivity of its 1,100 non-Aboriginal officers and has showed no real commitment to increasing Aboriginal representation on the force.

The Value of Aboriginal Representation

We believe that a police force is most effective if its members are representative of the community it serves. If the community is multicultural, the police force should have a similar multicultural mix. It almost goes without saying that a force will be more effective if its members speak the language or languages of those with whom it has to deal.

There is no question that Aboriginal people are not represented in the Winnipeg Police Department in proportion to their representation in the population, to say nothing of the proportion of persons of Aboriginal descent dealt with by the police. The same problem exists in the RCMP and the Brandon City Police, as well.

One way in which the Winnipeg police may begin to convince Aboriginal people of the sincerity of their efforts to improve relations with them is to see that Aboriginal people are represented substantially among the members of the force. As researchers Douglas Skoog and Irwin Barker say, the numbers of Aboriginal officers must be considerable:

> Ideally, the police force should mirror the ethnic composition of the community it serves. That is, the target number should be based on the proportion of the

> Aboriginal people in the community. The hiring of a small number of Aboriginal officers would be misinterpreted as a transparent gesture designed to pacify relations with police among Aboriginals without allowing Aboriginal officers to make a meaningful impact on the force or on the community it serves. [1]

There are many advantages to the Winnipeg Police Department, to Aboriginal people and to the community at large of increasing Aboriginal representation on the force:

- They will be able to speak the language of those with whom they have to deal. While most younger Aboriginal people speak English, that should not imply that they fully understand everything said to them by non-Aboriginal police.
- Knowing the Aboriginal community and its members, they will be able to do preventive policing.
- When sensitive situations involving Aboriginal people arise, an Aboriginal officer would likely have a better understanding of the problem than an officer brought up in a different culture. If an officer understands the nature of a problem, it would follow that such an officer would be more effective in resolving it.
- They will be excellent role models for Aboriginal youth.
- They will give Aboriginal people confidence that the police force is interested in them.
- When making an arrest, Aboriginal police should be better able to make certain that Aboriginal people understand what will happen in various court proceedings.
- If an Aboriginal person is being arrested and needs family or community support of some kind, the Aboriginal officer probably will have a better idea of where that support might be available. The same will be true of recommending services for victims of crime.
- They would be better able to give *Charter* and police warnings in such a way as to ensure that Aboriginal people understand their rights.
- They would be better able to assist in the taking of statements from Aboriginal accused so as to ensure that the true intent of the accused is reflected in the document.
- They would be able to assist their fellow officers in understanding Aboriginal culture and behaviour. Working with Aboriginal officers will have a positive impact on non-Aboriginal officers' perceptions of Aboriginal people.

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1 Angus Reid Group, "Effects of Contact with Police Among Aboriginals in Manitoba," research paper prepared for the Aboriginal Justice Inquiry, Winnipeg, 1989, p. 76.

- The presence of Aboriginal officers would enhance the image of Aboriginal people among the general public.

We do not recommend that Aboriginal officers restrict their service to Aboriginal areas of the city. The general population would benefit from seeing Aboriginal people involved in general police work. It is important that the entire population start seeing Aboriginal people in a new light. We are not just selecting police forces as the only place of employment where there should be a greater representation of Aboriginal people. Similar efforts will have to be made by governments at the federal, provincial and civic levels. Private employers generally also will have to make a positive effort to employ and to train Aboriginal people.

The question to consider is not whether Aboriginal people should be represented on the police forces of the province, but in what numbers.

Employment Equity

Although the City of Winnipeg Personnel and Police departments have made limited efforts within recent years to recruit visible minorities including Aboriginal people, their efforts have achieved little success. There continues to be an unacceptably low number of Aboriginal people on the force. This arises partly from low numbers of Aboriginal applicants. But more significantly, we believe, the under-representation arises from the department's use of recruiting methods and standards that operate as a "built-in headwind," which not only discourages Aboriginal people from applying, but also prevents them from getting in. More aggressive action will be required to alleviate such systemic discrimination and increase the extremely low numbers of Aboriginal people on the force. The numbers of Aboriginal officers and other staff members must be increased substantially, and quickly.

Employment equity or affirmative action programs are designed to eliminate systemically induced inequities and to redress historical employment disadvantages suffered by minorities. Such programs offer positive remedies for discrimination in the workplace. In the 1984 *Report* of the Commission on Equality in Employment, Commissioner Rosalie Abella stated:[2]

> Remedial measures of a systemic and systematic kind are the object of employment equity and affirmative action. They are meant to improve the situation for individuals who, by virtue of belonging to and being identified with a particular group, find themselves unfairly and adversely affected by certain systems or practices....
>
> Systemic remedies are a response to patterns of discrimination that have two basic antecedents:

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2 Canada, Royal Commission on Equality in Employment, *Report* (Commissioner Rosalie Abella), (Ottawa: Supply and Services, 1985), p. 9-10.

a) a disparately negative impact that flows from the structure of systems designed for a homogeneous constituency; and

b) a disparately negative impact that flows from practices based on stereotypical characteristics ascribed to an individual because of the characteristics ascribed to the group of which he or she is a member.

The former usually results in systems primarily designed for white able-bodied males; the latter usually results in practices based on white able-bodied males' perceptions of everyone else.

In both cases, the institutionalized systems and practices result in arbitrary and extensive exclusions for persons who, by reason of their group affiliation, are systematically denied a full opportunity to demonstrate their individual abilities.

Interventions to adjust the systems are thus both justified and essential. Whether they are called employment equity or affirmative action, their purpose is to open the competition to all who would have been eligible but for the existence of discrimination. The effect may be to end the hegemony of one group over the economic spoils, *but the end of exclusivity is not reverse discrimination, it is the beginning of equality. The economic advancement of women and minorities is not the granting of a privilege or advantage to them; it is the removal of a bias in favour of white males that has operated at the expense of other groups.* (p. 9–10) [Our emphasis]

Employment equity entails programs of positive remedy for discrimination in the workplace. The Winnipeg Police Department's hiring programs have not addressed the complexity of the problem and its efforts to date have fallen far short of what is required.

Winnipeg Police Department Hiring Initiatives

Chief Herb Stephen testified that both the City of Winnipeg and its police department have made efforts to recruit more minority members. He told us that he has always wanted more visible minorities in the department, and that he has worked with the City's Equal Employment Opportunity office and the Mayor's Race Relations Committee towards that goal. He said he would like to see minority people in every recruit class. To that end, the department has removed height and weight restrictions, criteria which were a barrier to women and some ethnic groups. The department also has advertised in ethnic newspapers to attract recruits, but according to Chief Stephen these ads have produced few results.

In a recent effort, the City of Winnipeg Personnel Department, in conjunction with the police department, developed a five-year outreach recruitment plan of action. The plan attempts to promote a positive image of the police department with minority and Aboriginal groups, and attempts to create an interest in police work. The plan also requires active recruitment efforts directed at minorities and Aboriginal people by raising

the knowledge of police work. Success is monitored through the keeping of statistics on the number of minority and Aboriginal recruits. Community policing in the form of three storefront operations is part of the effort to ensure ongoing communication between the force and Aboriginal people in hopes of improving police-community relations.

Chief Stephen said that a departmental recruiting team, partially made up of Aboriginal and minority officers, was formed to make contact with ethnic groups and to encourage enlistment. It has developed an informational video to be shown on public television as well as posters to be distributed around the city. The four officers are engaged in the performance of regular duties while the program is in its development stage. Although there have been discussions about visiting reserves in an effort to attract Aboriginal applicants, that does not appear to have been done to date.

The Chief testified that for several years a sergeant had been assigned to the department's affirmative action program. However, this program has been working without a budget since May 1989.

Despite the department's professed efforts, we do not see any improvement in the level of Aboriginal hiring.

Impediments to Success

There are attitudinal barriers within the department which are blocking effective efforts to increase Aboriginal or minority employment. Many of these stem from racial stereotypes and misconceptions about the intent of employment equity programs.

Dr. Neil McDonald is a former professor of education who now is involved in training and educational programs, and in the development of training materials for public and private agencies. He has conducted courses on cross-cultural training for recruits and senior officers of the Winnipeg Police Department. McDonald testified that there was a general misunderstanding on the part of those entering the force as to what employment equity was about. He also said that members of the recruit class of August 1988, for example, made very strong negative racist statements about Aboriginal people. He stated that he had heard such sentiments frequently, but seldom so aggressively expressed. McDonald found that there were very strong feelings in this group about employment equity because of the possibility that the department might hire people from the Aboriginal community. There was a perception that just because a person was black or Aboriginal, he or she need only apply to the police force to be accepted on that basis. Recruits feared that an affirmative action program might jeopardize their future safety by encumbering them with underqualified partners.

It is not only among recruits that there is opposition to employment equity. There obviously is also resistance to equitable recruitment programs in the upper echelon of the department's administration, including the Chief of Police.

Chief Stephen told us he is opposed to the use of quotas. The use of quotas is a well-recognized means of ensuring that employment equity programs achieve results and are not merely public relations exercises. But Stephen said that he believed that every recruit or applicant must compete for the available spaces. The current procedure is that if two applicants are considered to be equally qualified, preference may be given

to the Aboriginal applicant. From what we heard about the selection criteria, we doubt if the present system will allow any Aboriginal applicants to be considered equal in every category with other applicants.

The Use of Educational Criteria in Recruitment

Educational requirements have proved to be one of the major barriers to increased Aboriginal hiring at the Winnipeg Police Department. There is now a requirement that recruits must have completed grade 12. Chief Stephen said that this requirement must be maintained because anyone with less than a grade 12 education would find it difficult to perform his or her duties properly. Stephen stated, "They don't need just that grade 12 certificate, but just to show that they have the ability of going forward and achieving it." The Chief said that any Aboriginal applicants lacking a grade 12 standing should upgrade themselves on their own and then apply to the department.

Stephen testified that it would be a disservice to the police department to vary the grade 12 requirement. He said police work continues to become increasingly complex and "lowering the standard" for Aboriginal recruits would make it difficult for them to be accepted by other members of the department.

We tend to agree with this latter concern. It would be unfair, in our view, to have different and "lower" standards for Aboriginal recruits. It is our view that society generally, and Aboriginal people in particular, would not benefit from the application of less stringent or less demanding entry criteria for Aboriginal members than for non-Aboriginal members of the Winnipeg Police Department, and we do not advocate that. However, we believe that varying the way in which the Winnipeg Police Department approaches educational requirements so as to make them more fair would not lower the quality of police recruits, nor would it be a disservice to the department.

Chief Stephen's comment that applicants' grade 12 standing shows "that they have the ability of going forward and achieving it" discloses both the strength and the weakness of using such a criterion.

The conclusion that a person is proved competent by completing grade 12 leads almost automatically to the conclusion that anyone who does not is incompetent. The assumption that completion of grade 12 is a reasonable basis for comparison of individuals, however, is based upon a false premise: that everyone in society has equal access to education. For Aboriginal people that has not been the case.

Aboriginal people historically have been denied equal educational opportunities and resources in Manitoba, and throughout Canada. The residential school system, which was operated by the Department of Indian Affairs throughout Canada as late as the 1970s, was a colossal failure in providing suitable education to Indian children. Very few children ever completed high school within that system, primarily because it was not geared to educate but to acculturate. It was an abusive system and Indian children escaped from it at the first opportunity—generally when they turned 16 years of age and no longer could be compelled to stay.

That system and the subsequent policy of educating Indian children in the provincial public school system usually required them to attend school in communities away

from their reserves, sometimes hundreds of miles away. The public school system continued the acculturative bias against Aboriginal children, generally teaching them material in ways which denied to them the relevance of their cultures and identities as Aboriginal people. The resulting feelings of alienation greatly contributed to Aboriginal children leaving school at the first opportunity. It was not until 1972 that the Government of Canada altered its policy of acculturation and instituted a more meaningful policy of "Indian Control of Indian Education." However, even that has not yet addressed the problem adequately.

Most Aboriginal communities in Manitoba still lack adequate high school facilities and Aboriginal parents still must send their children out of their communities to attend high school. As attractive as this may be to some, it is still much more difficult to attend and successfully complete school in a distant community, where family supports and contacts are lacking, and social and school supports are foreign.

Even those Aboriginal communities which do have their own high schools are disadvantaged. The Department of Indian Affairs provides them with a lower level of financial and other resources than that received by provincially funded schools in the rest of the province.

Aboriginal people in urban areas continue to face an alienating public educational system which actually discourages Aboriginal children by discounting the importance of their identity. The public school system is rooted in and biased in favour of the cultures of European societies. These biases, while slowly being addressed and overcome, contribute to the fact that, according to the 1986 Canadian census, only 17% of the Indian population had graduated from high school.

Chief Stephen is quite correct in his assertion that completing grade 12 is an indication of achievement. What he perhaps does not realize is that, for Aboriginal children, it is considerably more of an achievement than for non-Aboriginal ones. In the light of such historic disadvantage, using grade 12 criterion as a prerequisite for entry into the police department affects the Aboriginal community more adversely than the rest of society.

American courts have declared this form of impact unlawful. One milestone case was the United States Supreme Court decision in *Griggs v. Duke Power Co.* (91 S. Ct. 849 (1971)). In that case, the employer historically had hired only whites but, following the American *Civil Rights Act* of 1964, had changed that policy. It instituted a hiring process that included, among other things, a condition that all employee applicants had to have a grade 12 standing to be hired or promoted. The court noted that in that state, school segregation laws had prevented black people from receiving equality in education and that such a policy had resulted in most black people's not achieving a grade 12 standing. The Supreme Court held that the use of the grade 12 criterion in that circumstance amounted to a "built-in headwind" for black people and systematically excluded more of them from being considered for employment and promotion than white people. The court noted that there were other, non-discriminatory ways of determining ability. Language and motor skills could be assessed otherwise, as could general intelligence. Finally, the court took note of the fact that completing high school did not automatically give a person the skills necessary to perform employment-related tasks. It went on to rule that to use grade 12 in those

circumstances, in a way that resulted in abnormally higher numbers of blacks being excluded, amounted to systemic discrimination. We believe that the same considerations should apply in this instance.

Having a grade 12 standing does not indicate much, some believe, but it might arguably indicate the following:

- A basic level of reading and writing abilities.
- A knowledge of basic mathematical and scientific principles.
- A basic knowledge of historical and contemporary social and political issues.
- An ability to problem-solve.
- An ability to achieve goals.

If that is why the Winnipeg Police Department uses grade 12 as a criterion, we believe that all these abilities can be measured in alternative ways that will not affect Aboriginal people adversely and still will enable the Winnipeg Police Department to obtain police recruits with acceptable skill levels and achievement orientation. It is our opinion that adequately skilled Aboriginal people, capable of doing police work, are being excluded unfairly by the use of the grade 12 criterion.

We conclude that the simplistic application of the grade 12 criterion for police recruits has an adverse impact on Aboriginal people, in that it unreasonably and systematically excludes more of them from entry into the Winnipeg Police Department than any other group. We conclude, as well, that better alternatives exist to determine or measure whatever it is that the use of the grade 12 criterion is believed to show, including achievement, intelligence, knowledge and skills. Its continued use in the face of such conclusions amounts to systemic discrimination.

In addition, we understand that any one of a number of other "standards" may be used by Winnipeg Police Department recruiters to eliminate a candidate. Candidates are required not only to have a complete grade 12, but also to pass a physical test and undergo two interviews before being considered for the department. We were told of an Aboriginal candidate who applied three times for admission to the department. The first time he was turned down because he lacked his grade 12. So he went back to school. Then he applied again, but this time he failed to do the required number of sit-ups in the allotted time. He was failed again. He applied once more and this time did the required number of sit-ups, but did not perform another physical test as well as he had on his previous attempt and, was failed once more. He gave up applying.

The Core Area Initiative, a joint program of the federal, provincial and Winnipeg governments, recently offered a Human Justice Training Program. The program offered upgrading to a grade 12 equivalency so that applicants could meet the grade 12 requirement of the Winnipeg Police Department and the RCMP. However, during the three years of the program, only one of the 16 Aboriginal students who completed the course was accepted into the Winnipeg Police Department. Although all the students

had the requisite grade 12 and passed the physical tests, they either failed the character reference segment (one had a bad credit rating) or "failed" the interview.

The process of recruitment for the Winnipeg Police Department appears to have far too many built-in "gatekeeping" rules. We believe that any recruitment or employee selection process should use criteria which fairly assess candidates on their overall intelligence, knowledge, abilities, performance and history. Recruits should not be eliminated for failing only one element. Failing a recruit based on one officer's assessment of an applicant's interview performance seems counter-productive. Recruits should be scored in a variety of categories, including their membership in and ability to communicate with a minority group, and overall scores should be used to determine suitable candidates. In this way, additional marks would be given to applicants who can speak an Aboriginal language, understand Aboriginal society and demonstrate a special ability to deal with Aboriginal people. Making Aboriginal status a positive element of recruitment can only, in our view, result in a better police department, able to provide policing services more effectively and appropriately to the citizens of Winnipeg.

A Hiring Plan

In reviewing the City of Winnipeg Police Department's practices and standards, we found that they have an unjustifiably adverse impact on Aboriginal people in Winnipeg. That leads us to conclude that a strong remedy is justified. The employment equity program of the City of Winnipeg Police Department was intended to address the poor relations between the police and Aboriginal community, but has not improved the situation. Aboriginal people continue to be affected unfairly and adversely by the recruitment, training and hiring processes of the department.

The recruiting standards of the department have resulted in a disparately negative impact on Aboriginal people, and have had the effect of eliminating Aboriginal people at various points in the recruitment and hiring process. The development of educational standards and institutionalized prejudices historically has resulted in the exclusion of Aboriginal people, who systematically have been denied a full opportunity to demonstrate their individual abilities as police officers.

Aboriginal people need to know that they will no longer be unfairly denied access to those opportunities for which they are not only qualified but for which they are as qualified as other applicants.

Hiring sufficient numbers of Aboriginal officers will require a massive recruiting and training effort by the Winnipeg Police Department. In December 1990 there were 18 Aboriginal officers on the force, out of a total of 1,125 officers. Since Aboriginal people make up 11.8% of Manitoba's population, the force must hire an additional 115 Aboriginal officers in order to reach a more equitable number of 133. Such a significant increase will be accomplished only through an effective employment equity program which develops more suitable entry criteria and sets recruitment quotas to bring racial and cultural balance to the workforce.

Practices, procedures and criteria barring Aboriginal people from becoming police officers must be eliminated and employment equity measures implemented. More energetic recruitment efforts are needed. Barriers to the training and hiring of Aboriginal people must be eliminated. Occupational qualifications and requirements should be amended to permit more Aboriginal applicants. The grade 12 educational criterion has an adverse impact on Aboriginal people and is not a legitimate standard. It is a barrier to Aboriginal people and must be removed. The grade 12 requirement is not objectively relevant to the job or an objective indicator of a person's ability. Alternative intelligence and skill determinant methods could meet the department's objective better, while lessening the adverse impact on Aboriginal applicants. A better indicator would be an objective, unbiased test that would determine whether a person is qualified to perform the duties of a police officer. Those who pass such a test should be provided the opportunity to become police officers.

We do not recommend a special constable program for the Winnipeg Police Department. Aboriginal officers will be in a better position if they enter as regular constables with a status equal to other constables. They should not have to take additional training to become regular members. If proper criteria are used, any such program will be unnecessary. Lateral transfers from other departments also should be encouraged for Aboriginal officers.

Dr. McDonald testified that the department should put "fast-tracking" into place, and accelerate or promote capable individuals from minority groups. We agree with that. We believe that it is not sufficient merely to increase the number of Aboriginal recruits in the department. Those recruits must also have the opportunity to advance to senior positions. There must be a commitment to a system of early promotion of those who are qualified but who lack seniority. To succeed, such a system will require cooperation and support from senior departmental management.

The department also should be required to have an employment equity committee made up of representatives of management, the police association and Aboriginal groups. The committee would be required to report on the department's progress and provide information on the participation of Aboriginal people in the department's work force while ensuring employee confidentiality. To assist the department in attaining the objectives of employment equity, an annual internal objective should be set by the committee. We recommend that during the first year of operation, all recruit classes be made up entirely of Aboriginal people, a goal that would not be difficult to meet if adequate recruitment efforts are employed and more appropriate selection criteria are set. In subsequent years, 50% of each recruit class should be Aboriginal, until a time when minimum representation levels are met.

In all of this we also believe the Province of Manitoba has a role to play. As the senior government, we believe it has the responsibility to ensure Aboriginal representation is not only a goal of the Winnipeg Police Department, but that it becomes a reality. We are aware that the government can influence the inclination of the department to pursue an acceptable employment equity plan. This can be accomplished through the Minister of Justice's overall responsibility for policing in the province and the Province's

annual contribution of funding to the City for policing and other services. Therefore, we conclude that the Province should exercise its power and authority in both areas to achieve the results we recommend.

To be successful, it is essential that any measures or programs undertaken by the City of Winnipeg Police Department have the input of the Aboriginal community. Increasing the numbers of Aboriginal men and women on the force will be one of the most effective ways to improve the standing and respect for the force with the Aboriginal community and will, we are confident, result in more effective policing.

WE RECOMMEND THAT:

- The Winnipeg Police Department prepare and table with the City Council and the Minister of Justice, no later than December 31, 1991, an employment equity plan which has clear targets, target dates, and remedies should targets not be achieved.
- The City of Winnipeg Police Department set an initial target of 133 Aboriginal police officers. The first step in reaching that goal should be to designate the next recruiting class as entirely Aboriginal. Thereafter, 50% of each recruit class be dedicated to Aboriginal recruits until the target has been met.
- The Winnipeg Police Department be required to report publicly the progress of its employment equity program to the Minister of Justice.
- A portion of the funding provided by the Province to the City of Winnipeg for police salaries be conditional on the Winnipeg Police Department's using that funding for the hiring of Aboriginal police officers.
- The assignment of Aboriginal police officers not be restricted to the core area or other Aboriginal areas of the city.
- The Winnipeg Police Department no longer rely on the grade 12 educational criterion for police recruitment and develop approaches which test more appropriately recruits' ability to perform the functions required of police officers.

Cross-Cultural Awareness

The City of Winnipeg Police Department has a poor record of increasing cross-cultural awareness.

At the time that he testified, Dr. McDonald was in the process of drafting training materials for the City of Winnipeg Police Department. The course intended to look at the government's policy of multiculturalism, immigration patterns, prejudice and

discrimination, attitudes (how they are formed and how they affect behaviour), culture and misinterpretation of cultural traits and how they influence miscommunication. Approximately half the course is spent in study of Aboriginal issues.

McDonald testified that:

> I think racist and prejudiced attitudes are fairly prevalent in society at large. And in my view, at least from my experience, the prejudice towards Aboriginal peoples is probably the strongest and certainly they are the peoples that are the most widely and wildly stereotyped in our society....
>
> And most people ... especially the males, can probably remember that the first arguments they had as a kid is who is going to be the cowboy and who is going to be the Indian. Then they set about killing each other and arguing who was killed and who wasn't ... one of the things that those Indians do is they kill children and they kill women around the wagon trains and so on and it's reinforced through the media, through play and so on ... these notions of the Indian people ... are reinforced as people grow older ... and recent studies in our community indicate the same kind of thing....
>
> I think only a fool would say that there aren't racist and prejudiced attitudes and very strong ones towards Indian people, and some of the strongest ones that I've heard expressed in my professional career are towards Indians.... Winnipeg is no exception by any means, and I think that one of the things that perhaps the Commission is doing is holding a mirror up to the face of Canadians or Winnipeggers and I'm not sure they like the image. (p. 2470–71)

He continued:

> [P]olice officers ... are as likely to hold as negative attitudes as anyone else. And ... I would say that the only difference that I would find in my training with police officers, ... is that they're more inclined to be up front about their expressions.... [P]rejudice and racism is certainly an issue.... I'm always very concerned when I hear any expressions of racism or prejudice.... I'm more so concerned when it comes from somebody who has to relate to a public because ... somebody who relates to a public and delivers a service and has a racist or a bigoted attitude, I think when a member of that group gets a service that they're more likely to be shortchanged rather than be treated in a more professional manner. (p. 2473)

McDonald testified about the negative racial attitudes exhibited in the recruit class of August 1988, in which a number of recruits made racist statements about Aboriginal people, such as, "the whites will soon be the minorities," "[Aboriginal people are] always getting something for nothing," and "you find them on Main Street and that's what they do with what they get."

As we have seen in the previous chapter, it is clear that racist attitudes exist among members of the police force. The Chief of Police and counsel for the Winnipeg Police

Association suggested to us that the presence of racism in the force simply was reflective of racism in society and suggested it was, therefore, not a special problem. We disagree. Police officers occupy a unique and powerful position in our society. They have the ability to interfere with the freedom of citizens and are called upon to protect society from the misdeeds of its members. The position of police officers provides them with opportunities to intrude into our lives—a right denied to all others. We have every right to expect and demand from them that they fulfil their responsibilities fully, fairly and in a manner that does not discriminate against anyone on account of race. It is not acceptable for any member of society to do that, but it is even more unacceptable for a police officer to do so.

Cross-cultural educational courses should be given to every member of the force, whether they have had one before or not. The course for recruits should be enhanced and regular refresher courses also should be given to all officers from the Chief on down. The department should consider employing psychological tests that will detect whether a person has racist attitudes or tendencies. We believe that such tests can be developed with appropriate professional input. Those with racist attitudes and tendencies should not be accepted into the Winnipeg Police Department.

The Winnipeg Police Department should attempt to develop a force of professional police officers who are culturally aware and sensitive, and have the respect of the community.

All members of the community have the right to fair and sensitive policing. The Winnipeg Police Department should recognize this right by making a commitment to hiring an appropriate number of Aboriginal police officers and by increasing the cultural awareness of present members of the department.

WE RECOMMEND THAT:

- Part of the entrance requirements for the Winnipeg Police Department consist of attitudinal testing regarding issues such as race and racism in order to reduce the possibility of recruiting bigoted or racist officers.
- Periodic attitude testing of all officers be undertaken after two years of service and at regular intervals thereafter, especially when they apply for promotion or any special responsibilities.
- Cross-cultural training for all recruits and police officers be improved and expanded.
- The objectives, content and methodology of the cross-cultural segment of the course systematically be reviewed and evaluated.
- Training supervisors for new recruits be selected carefully. Recruits should be teamed up with experienced officers who have a good reputation and rapport with groups in the community.

CHAPTER 12

CONCLUSIONS

It is our conclusion that the City of Winnipeg Police Department did not search actively or aggressively for the truth about the death of J.J. Harper. Their investigation was, at best, inadequate. At worst, its primary objective seems to have been to exonerate Const. Robert Cross and to vindicate the Winnipeg Police Department.

We believe that evidence was mishandled and facts were obscured by police attempts to construct a version of events which would, in effect, blame J.J. Harper for his own death. Our review of the taking of Cross' statement leads us to conclude that he was assisted in its compilation rather than being questioned. We have found that at least one officer rewrote his record of events.

The Police Chief pre-empted the possibility of an effective investigation by exonerating Constable Cross prematurely and unjustifiably. His conduct was just the visible expression of an attitude which was prevalent in his department—an attitude which viewed the public image of the police department and the interests of one of its officers as more important than finding out the truth about the death of a citizen.

Examining this case has been a profoundly saddening experience. We are left with an overwhelming sense of how needless the tragedies of this case have been. What started as an unnecessary, racially motivated approach to an Aboriginal citizen on a city street has had profoundly disturbing results.

Candor, sensitivity and professionalism on the part of the Winnipeg Police Department would have helped to ease the loss of J.J. Harper's life. Instead, some

members of the department resorted to actions which have badly damaged the department's credibility and reputation.

To regain the respect of Winnipeggers—both Aboriginal and non-Aboriginal—the department must immediately undertake changes designed to address the issues we have identified.

Proper and more independent methods of investigating officer-involved shootings must be instituted immediately so that no question is ever raised again about the propriety of an officer's conduct or the department's investigation of it. The City of Winnipeg Police Department and the Police Chief must accept that independent investigations of officer-involved shootings not only will enhance the reputation and credibility of the department, but are ultimately the best way to ensure fairness to the officer and to any other party involved.

Members of the department and leaders of the City of Winnipeg must accept the presence and importance of Aboriginal people, both as citizens and as members of the police department. The ability of the Winnipeg Police Department to provide proper policing will be greatly enhanced if it is able to recruit and retain more Aboriginal police officers. To the extent that we have identified those factors which have prevented that from happening, we believe that immediate steps must be taken to alter or remove them.

Members of the department would benefit greatly from having more awareness and education about the cultures and beliefs of Aboriginal people. Steps to implement initial and ongoing cross-cultural awareness training programs for police force members at all levels of the force are essential.

It is clear to us that the stresses created from this incident and from the scrutiny which resulted will linger for some time to come. Some of the individual officers and citizens involved undoubtedly will continue to suffer from the impacts of this tragedy. Other officers, we are certain, have felt the frustration that goes with overly broad criticism. The Chief and the department, therefore, must realize the importance of coming to terms with what has happened and take positive steps to put it to rest by showing that they are prepared to learn from this experience.

Society requires capable and professional police forces. We sometimes impose upon them responsibilities that are burdensome and expectations that border on the unrealistic. For those reasons, we must understand and accept that on occasion errors will be made and mistakes will happen. We do not demand perfection from our police forces.

At the same time we are entitled to insist that they perform their obligations and duties in a professional and responsible manner. Such a demand need not place any undue strains or restrictions upon the work and efforts of police departments. We have every reason to believe that the vast majority of police officers in the Winnipeg Police Department perform their jobs with a sense of professionalism that would stand up well to any scrutiny and which would do any department proud. The City of Winnipeg has enjoyed a long and proud history insofar as its police department is concerned.

This incident need not be a permanent blemish upon that history. It can provide important opportunities for the City and the department to begin a new era in which the citizens of the City of Winnipeg will receive policing services from an abler and wiser force.

APPENDIX I

1. Witnesses at the Harper Hearing in Order of Appearance

Name	Date of Appearance
Boan, Const. Craig Robert	August 21, 1989
Brown, Milton Ben	August 21, 1989
Pryor, Bill	August 21, 1989
Harrop, Sandra	August 21, 1989
Roulette, Allan Joseph	August 22, 1989
Wood, Joseph Enard Carlson	August 22, 1989
Allan (unidentified youth)	August 22, 1989
Williams, Sgt. Henry Stuart	August 23, 1989
Smith, Murray Andrew	August 23, 1989
Morissette, Edna Linda Marie	August 24, 1989
Hampton, Const. Randy William	August 24, 1989
Sever, Carol Emily	August 24, 1989
Swan, Chief Raymond Robert	August 24, 1989
Eakin, Const. Grant George	August 24, 1989
	& August 28, 1989
Yaren, Dr. Stanley	August 25, 1989
Loewen, Dr. Linda	August 25, 1989
Davis, Dr. William	August 25, 1989
Gillmor, Donald Ross	August 28, 1989
Pruden, Melvin George	August 29, 1989
Bedosky, Jeffrey Curtis	August 29, 1989
Isaac, Const. William	August 30, 1989
Cross, Const. Robert Andrew	September 1, 1989
Bushie, Kathleen	September 11, 1989
Williams, Rosalind Joyce	September 11, 1989
Sinclair, Tanya Roseanne	September 11, 1989
Smyth, Const. Danny Gerald	September 11, 1989
Hooper, Const. Douglas Lorne	September 11, 1989
Parker, Sgt. Robert Wesley	September 11, 1989
	& September 12, 1989
Tymchuk, Michael John Joseph	September 13, 1989
Spryszak, Const. Glen Joseph	September 13, 1989
Hrycyk, Insp. Eric James	September 18, 1989
Poneira, Const. Richard Alexander	September 19, 1989
McDonald, Dr. Neil	November 6, 1989
Zacharias, S/Sgt. Menno	November 7, 1989

Hodgins, Const. Kathryn	November 7, 1989
Stephen, Chief Herbert Bishop	November 8, 1989 & November 9, 1989
Morton, William White	November 9, 1989
Reichardt, Paul	November 9, 1989

2. Witnesses by Alphabetical Order

Name	Date of Appearance
Allan (unidentified youth)	August 22, 1989
Bedosky, Jeffrey Curtis	August 29, 1989
Boan, Const. Craig Robert	August 21, 1989
Brown, Milton Ben	August 21, 1989
Bushie, Kathleen	September 11, 1989
Cross, Const. Robert Andrew	September 1, 1989
Davis, Dr. William	August 25, 1989
Eakin, Const. Grant George	August 24, 1989 & August 28, 1989
Gillmor, Donald Ross	August 28, 1989
Hampton, Const. Randy William	August 24, 1989
Harrop, Sandra	August 21, 1989
Hodgins, Const. Kathryn	November 7, 1989
Hooper, Const. Douglas Lorne	September 11, 1989
Hrycyk, Insp. Eric James	September 18, 1989
Isaac, Const. William	August 30, 1989
Loewen, Dr. Linda	August 25, 1989
McDonald, Dr. Neil	November 6, 1989
Morissette, Edna Linda Marie	August 24, 1989
Morton, William White	November 9, 1989
Parker, Sgt. Robert Wesley	September 11, 1989 & September 12, 1989
Poneira, Const. Richard Alexander	September 19, 1989
Pruden, Melvin George	August 29, 1989
Pryor, Bill	August 21, 1989
Reichardt, Paul	November 9, 1989
Roulette, Allan Joseph	August 22, 1989
Sever, Carol Emily	August 24, 1989
Sinclair, Tanya Roseanne	September 11, 1989
Smith, Murray Andrew	August 23, 1989
Smyth, Const. Danny Gerald	September 11, 1989
Spryszak, Const. Glen Joseph	September 13, 1989

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Stephen, Chief Herbert Bishop	November 8, 1989 & November 9, 1989
Swan, Chief Raymond Robert	August 24, 1989
Tymchuk, Michael John Joseph	September 13, 1989
Williams, Rosalind Joyce	September 11, 1989
Williams, Sgt. Henry Stuart	August 23, 1989
Wood, Joseph Enard Carlson	August 22, 1989
Yaren, Dr. Stanley	August 25, 1989
Zacharias, S/Sgt. Menno	November 7, 1989

APPENDIX II

Exhibits at the Harper Hearings

1. Rules of Procedure of the Aboriginal Justice Inquiry, J.J. Harper hearings, June 19, 1989
2. Transcript of inquest proceeding, April 11–20, 1988
3. Inquest Report of Judge Enns, May 26, 1988
4. Inquest list of exhibits, April 5–14, 1988
5. Report on autopsy on J.J. Harper conducted by Dr. Peter H. Markesteyn, Chief Medical Examiner, March 10, 1988
6. Book of photos prepared by Const. Craig Boan
7. Diagram of scene, Winnipeg Police, Sgt. Robert Parker, March 9, 1988
8. Photographs taken by Milton Ben Brown, Private Investigator employed by World Investigation. Services engaged by Harvey Pollock (counsel for Harper family)
9. Transcript of radio transmission, Winnipeg Police, March 9, 1988
10. Transcript of telephone and radio transmission, March 9, 1988
11. Winnipeg Ambulance radio transmission, March 9, 1988
12. Ambulance protocol, blank form, no date
13. Ambulance report, March 9, 1988, transporting of J.J. Harper to Health Sciences Centre
14. Health Sciences Centre records, dated March 9, 1988, admission
15. Photos of clothing of Const. Robert Cross, March 24, 1988
16. Forensic report – serology, March 31, 1988, Staff Sgt. W.I. Mathison
17. Forensic report – hair, March 22, 1988
18. Forensic report – alcohol, March 22, 1988
19. Forensic report – firearm, March 22, 1988
20. *Guns and Ammo* magazine – May 1988 issue, "Modern Revolvers What Makes Them Tick," pages 44–49, 84–85
21. Forensic report – toxicology, March 14, 1988, R.J. Warren, RCMP, Toxicology Section
22. Guidelines for the Use of Firearms, Winnipeg Police (small card, no date)
23. Statement of Const. Robert Cross, March 9, 1988, taken by Sgt. Henry Williams
24. Copy of videotape taped by Milton Ben Brown
25. Letter from Dr. Marilyn Singer, dated August 17, 1989
    A. For Identification: Psychiatric report by Dr. Linda Loewen
    B. For Identification: Psychiatric report by Dr. David J. Globerman
26. Copy of handwritten statement, March 17, 1988, signed by unidentified witness

27. Copy of typed version of handwritten statement, dated March 17, 1988, signed by unidentified witness
28. City of Winnipeg Police, videotaped re-enactment of incident

C For Identification: Copy of chapter of *The Blue Wall* by Carsten Stroud

D For Identification: Medical report of Dr. Yaren

29. Forensic lab report by Murray Smith
30. Sealed container of seven caps used in testing clothing by Murray Smith
31. Copy of report of Dr. Stanley Yaren, dated August 2, 1989
32. Dr. Linda Loewen's report of August 1, 1989
33. *Saturday Night* magazine , December 1988 issue, "The Shooting of J.J. Harper," page 42
34. Photocopied extract of Const. William Isaac's notebook (no date showing)
35. Court assistance report prepared by Const. William Isaac, March 9, 1988
36. Supplementary report by Const. William Isaac, re: Melvin Pruden, March 9, 1988
37. Incident case report
38. Supplementary report prepared by Const. Randy Hampton, March 9, 1988
39. Special report prepared by Const. William Isaac, March 9, 1988
40. Supplementary report prepared by Const. William Isaac, March 16, 1988
41. Extract from Const.William Isaac's second notebook (11 pages), February 19, 1988 – March 14, 1988
42. Original notebook of Const. William Isaac
43. Revised notebook of Const.William Isaac
44. Dr. Linda Loewen's letter, dated September 1, 1989, to counsel for the Winnipeg Police Association, guidelines to aid Const. Robert Cross in testifying at the Inquiry hearing
45. Map of the City of Winnipeg
46. Const. Robert Cross' revolver
47. Const. Robert Cross' holster
48. Melvin Pruden's jacket
49. J.J. Harper's jacket
50. Cassette tape of radio transmissions
51. Video of scene prepared March 9, 1988 for Winnipeg Police Department by Sgt. Robert Parker
52. Overtime record of Michael Tymchuk, March 5–14, 1988
53. Videotape of Const. Glen Spryszak with gun drawn in incident of April 1988
54. Special report by Const. Glen Spryszak, March 9, 1988
55. Supplementary report by Const. Glen Spryszak, March 9, 1988
56. Regulation on police shootings, "Evidence Gathering," Winnipeg Police Department (no date)
57. Special report by Insp. Eric Hrycyk, March 9, 1988
58. Supplementary report by Const. Richard Poneira, March 16, 1988
59. Letter from Douglas Abra, re: Dr. Neil McDonald, August 14, 1989
60. Curriculum vitae of Dr. Neil McDonald

Appendix II

61. Extract of Winnipeg Police Department Policy Manual, re: notebooks (no date)
62. Audio transmission action form, Winnipeg Police Department, March 14, 1988
63. Report of Sgt. Shipman, re: Const. Kathryn Hodgins, March 18, 1988
64. City of Winnipeg letter, re: Const. Kathryn Hodgins' current condition and ability to give evidence from Dr. W.L. Davis to counsel for the Winnipeg Police Association, dated November 6, 1989
65. Performance Evaluation Report, Winnipeg Police Dept. (blank form), no date
66. Guide to Performance Evaluation Report, Winnipeg Police Dept. (blank form), no date
67. *Winnipeg Free Press* column by Gordon Sinclair, dated March 12, 1989, "Circling the Paddywagons"
68. Map of Logan/Winks area showing Winnipeg Police canvass
69. Supplementary report of officers Mazur and Anderson of March 11 and 17, 1988
70. Report of Supt. Clark Peckover and Insp. Kenneth Dowson, dated May 2, 1988, re: police mistakes disclosed at the inquest into the death of J.J. Harper
71. J.J. Harper's wallet and contents
72. Supplementary report of officers Cameron and Rautavuori, re: attempts to notify Harper's family on March 9, 1988
73. *Winnipeg Free Press* article of August 29, 1986, "Police Chief Touts Taped Statements"
74. District 6 interim policy on notebooks (no date)
75. Departmental regulation on notebooks (pre-December 1988)
76. Toronto Police Department Policy on notebooks, December 1985
77. Winnipeg Police Department – Winnipeg Police Association 1984–86 Collective Agreement with Promotions Manual
78. Firearms Board of Enquiry Procedure Manual used on March 9, 1988
79. Firearms Board of Enquiry Revised Procedure Manual (as of December 1988)
80. Report of Firearms Board of Enquiry into the shooting of J.J. Harper, March 10, 1988
81. Various supplementary reports reviewed by Firearms Board of Enquiry prior to ruling
82. Various supplementary reports not reviewed by the Firearms Board of Enquiry
83. Supplementary reports on car theft, March 9, 1988
84. Handwritten notes on blood and urine alcohol levels of J.J. Harper, reviewed by Chief Herb Stephen prior to press conference of March 10, 1988
85. Handwritten notes of Chief Stephen on report of Firearms Board of Enquiry, March 10, 1988
86. Winnipeg Police Department news release of March 9, 1988 at 9:00 a.m.
87. Winnipeg Police Department news release of March 10, 1988 at 3:30 p.m.
88. Letter of April 21, 1988 from Crown attorney W.W. Morton to Chief Stephen, Winnipeg Police Department
89. Memo to file dated June 10, 1988 by W.W. Morton

90. Report of Winnipeg Police Department Recruitment Team to Chief Stephen, March 10, 1989
91. Winnipeg Police Department plan of action on recruitment of minorities, February 1989
92. Extract from Winnipeg Police Department Policy Manual on handling of fatality cases (no date)
93. City of Winnipeg Policy on staff training and development, adopted by City Council on November 7, 1988 (reprinted February 1989)
94. Minutes of City Council of April 17, 1980, on educational standard of Winnipeg Police Department
95. Winnipeg Police Department press release of August 31, 1989, re: investigation of Const. William Isaac
96. Correspondence of Crown attorney W.W. Morton to Harvey Pollock, counsel for Harper family
97. Supplementary reports of officers Mazur, Anderson and Phillips, re: Jeff Bedosky, March 9, 1988
98. Winnipeg Police Department information on Aboriginal police officers on staff as November 1, 1989
99. Canvass done by Brian Savage, letter to Mr. Schulman (no date)
100. Canvass done by Steve Lechnowsky, April 12 – March 23, 1989
101.A Supplementary report of officers Foster and Sterdan, March 10, 1988
101.B Supplementary report of officers Sterdan and Littlewood, March 15, 1988
101.C Supplementary report of officers Anderson and Mazur, March 13, 1988
101.D Supplementary report of Sgt. J.R. Spiers' report, March 17, 1988
101.E Supplementary report of officer Davies, March 11, 1988
101.F Report of officer Smyth, re: holsters, March 28, 1988
101.G Letter from Chief Herb Stephen to Mrs. Lois Harper, March 11, 1988
102. Letter to U.S. Secret Service, September 7, 1989 from Commission counsel, re: report on notebooks
103. Letter from Dr. Peter Markesteyn, Chief Medical Examiner, and crime lab report of Vincent J.M. Di Maio, M.D., Vince Di Maio Crime Lab in Texas, dated October 26, 1989
104. Letter from Douglas N. Abra to Commission counsel, dated October 24, 1989
105. Handwritten suicide note left by Insp. Kenneth Dowson (no date)
106. Audio test readings from rear seat of Cruiser N202, August 1, 1989

APPENDIX III

Rules of procedure used during the public hearings into the Harper matter.

1. All evidence will be presented by viva voce testimony and the filing of relevant, admissible exhibits;
2. When the viva voce evidence deals with opinion, general attitudes or impressions, the strict rules of evidence will not apply;
3. When the rights or liability of any individual might be affected, the usual rules of evidence will be applied;
4. All witnesses will be called and examined by Commission counsel;
5. If counsel representing groups or individuals granted full or limited standing wish a witness to testify, then that counsel will request Commission counsel to call the witness;
6. If Commission counsel calls such a witness at the request of counsel for a group or individual, that witness will be examined by Commission counsel and thereafter may be cross-examined by all other counsel granted full standing;
7. If Commission counsel decline to call a witness at the request of counsel for a group or individual, that decision may be subject to review by the Commissioners;
8. All witnesses may be re-examined by Commission counsel;
9. Any witness called to testify before the Commission is entitled to be represented by counsel while testifying, but counsel for that witness may not necessarily be permitted to cross-examine or otherwise question that witness or any other witness;
10. Some counsel may be granted full standing and will be entitled to cross-examine all witnesses and make full argument;
11. Other counsel or parties may be granted limited standing and be entitled to deal with limited issues, or be entitled to argument only;
12. If a number of individuals or organizations apply for standing, and the interests of several appear similar, standing may be granted to more than one of those individuals or organizations, but subject to the requirement of representation by one counsel who will be entitled to participate fully, or on a limited basis, as the Commissioners may direct;
13. In the event the matter of *Regina vs. Dwayne Archie Johnston* is still pending before any court, the hearing in respect of Helen Betty Osborne will be postponed pending the final determination of that case.